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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 642

BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

No. 680

THE DELAWARE AND HUDSON RAILROAD CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 691

ERIE-LACKAWANNA RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 813

CITY OF SCRANTON, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 814

MILTON J. SHAPP, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 815

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion and order of the district court, as yet unreported, are appended to the Jurisdictional Statement in No. 642 as Appendix A.

The report of the Commission on reconsideration, entered September 16, 1966, set forth as Appendix B to that Jurisdictional Statement, will be printed at 328 I.C.C. 304. The preceding report of the Commission, entered April 6, 1966, will be printed at 327 I.C.C. 475, to be followed in the bound volume of the Commission's reports by the text of the Examiners' recommended report, served March 29, 1965. Copies of the latter report have been furnished the Court.

JURISDICTION

These proceedings were begun before the district court, constituted as a three-judge court, 28 U.S.C. 2284, to enjoin and set aside orders of the Commission under 28 U.S.C. 1336, 1398, and 2321–2325. The district court, by its order of October 4, 1966, declined to enter an interlocutory injunction. Timely notices of appeal and jurisdictional statements have been filed by the appellants in compliance with this Court's Rules and its *per curiam* order of October 18, 1966, which, *inter alia,* accelerated the appeals and stayed enforcement of the Commission's orders in the interim. The jurisdiction of the Court to consider the appeals is conferred by 28 U.S.C. 1253 and 2101(b). *Alabama* v. *United States,* 279 U.S. 229 (1929); *Virginian Ry.* v. *United States,* 272 U.S. 658, 672 (1926).

QUESTIONS PRESENTED

The orders of the Commission approved, subject to conditions, the merger of The Pennsylvania Railroad Company (PRR or Penn) and the New York Central Railroad Company (NYC or Central), pursuant to Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2). Fearful of an adverse competitive impact of the consolidation upon three smaller railroads, the Erie-Lackawanna Railroad Company (E–L), The Delaware and Hudson Railroad Corporation (D&H) and Boston and Maine Corporation (B&M), the Commission provided for their protection pending determination of their future as part of a major Eastern railroad system. The Commission ordered, first, that pre-merger routes, practices and rates be maintained by the merging railroads so as not to divert or tend to divert traffic from routes in which E–L, D&H, or B&M participate. Second, the Commission provided for indemnification of the three protected roads for revenue losses which they may sustain as a result of the merger notwithstanding the strictures of the traffic conditions. On reconsideration the Commission set these conditions for further hearing, leaving intact in the interim the traffic conditions, subject to their possible later modification, and providing that any indemnification conditions, as finally fashioned, shall apply retroactively to the date the merger is consummated. The Commission determined, however, that the applicants, PRR and NYC, having agreed to accept without judicial review whatever conditions might be evolved other

than for capital loss indemnification, consummation of the merger need not await its conclusion of the reopened proceeding. Indeed, the Commission declared that "[P]rompt consummation of the merger clearly would be in the public interest." 328 I.C.C. 311; J.S. B–13.[1] On review the district court declined to upset the Commission's determination and to enjoin the consummation of the merger. The ultimate question presented by these appeals is:

> Whether the district court abused its discretion in denying the motions for interlocutory injunction to restrain consummation of the merger pending the conclusion of the reopened proceeding before the Commission.

Embraced within this question are the subordinate questions:

> 1. Whether the court below erred in refusing to enjoin consummation of the merger until the Commission had determined the inclusion of E–L, D&H and B&M in a major rail system.
>
> 2. Whether the court below erred in refusing to enjoin consummation of the merger until the Commission determined, after a limited further hearing, special conditions for the protection of E–L, D&H and B&M pending such inclusion.
>
> 3. Whether there was a rational basis for the Commission's conclusion that prompt consummation of the merger was in the public interest.
>
> 4. Whether the protected railroads or other railroads, fearing legal injury in the indemni-

[1] "J.S." identifies the Jurisdictional Statement in No. 642.

fication conditions to be devised, have adequate remedies before the Commission and the courts, notwithstanding that the merger is consummated in advance of the conclusion of the reopened proceeding.

Certain additional questions posed by these appeals are, as follows:

1. Whether appellant Shapp, as a citizen and a stockholder of PRR, has standing to challenge the Commission's orders upon the grounds which he has asserted.

2. Whether appellant City of Scranton, which had only fragmentary participation in the Commission proceedings and which failed to raise most of its present contentions, was entitled to any relief in the court below.

STATUTES INVOLVED

The relevant statutes, 5 U.S.C. 1004 (now 554), 1007(b) (now 557(c)), 1009(c) (now 704); 1009(d) (now 705), and 1009(e) (now 706); 28 U.S.C. 1253, 1336, 2101(b), 2284, 2321, 2322, 2323, 2324, and 2325; and 49 U.S.C. 5(1), 5(2), and 5(9), are appended to the Jurisdictional Statement in No. 642 as Appendix D.

STATEMENT

A. THE APPELLANTS AND RELATED RAIL UNIFICATIONS IN THE EAST

Before turning to the merger of the PRR and NYC, it may be helpful to identify the appellants and their participation in the related rail unifications in

the East. First of these seven appeals is No. 642, that of the Baltimore and Ohio Railroad Company (B&O), the Central Railroad Company of New Jersey (CNJ), the Chesapeake and Ohio Railway Company (C&O), Norfolk and Western Railway Company (N&W), Reading Company (Reading) and Western Maryland Company (WM). N&W now is a 7,000-mile railroad, the northern tier of which extends from Des Moines and Kansas City on the west to Buffalo and Pittsburgh on the east and the other, from Cincinnati and Bristol on the west and Hagerstown and Norfolk on the east, with 1965 railway operating revenues in excess of $592 million and net railway operating income of nearly $118 million.[2]

The present N&W is the product of the Commission's report and order of June 24, 1964, in which the Commission authorized the merger into the Norfolk & Western Railway Company of the New York, Chicago & St. Louis Railroad Company (Nickel Plate), the acquisition by N&W of the Wabash Railroad through lease and stock control, the acquisition by N&W of stock control of the Akron, Canton & Youngstown Railroad Company, the lease by N&W of the properties of the Pittsburgh & West Virginia Railway Company, and the purchase by N&W of the Sandusky line of PRR. *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger*, 324 I.C.C. 1.

[2] Data taken from Interstate Commerce Commission, *Transport Statistics for 1965*, and *Moody's Transportation Manual* (September 1966).

In the N&W-Nickel Plate proceeding, E–L, petitioned before the hearings that, pursuant to Section 5(d) of the Interstate Commerce Act, the Commission require its inclusion in the proposed merger, and similar petitions were filed by D&H and B&M. After the hearings, E–L withdrew its petition for inclusion pursuant to an agreement with N&W that upon approval of the merger N&W would enter into negotiations in good faith with E–L in an attempt to agree upon some form of affiliation. See 324 I.C.C. at 19–20. Finding that "insofar as the Delaware & Hudson and the Boston & Maine are concerned, the proposed Norfolk & Western system should have no harmful effects" (324 I.C.C. at 31), the Commission did not condition its approval of the N&W merger upon present inclusion of E–L, D&H, or B&M.

However, the Commission recognized that E–L, D&H, and B&M "have petitioned for inclusion in the Pennsylvania–New York Central system, but in each case an affiliation with the Norfolk & Western is preferred" (324 I.C.C. at 30). Accordingly the Commission, in approving the N&W–Nickel Plate merger and related transactions, imposed the following condition in Appendix O to its report (324 I.C.C. at 148):

> For a period of 5 years following the date of the order herein the Commission will retain jurisdiction to permit the filing of petitions by the Erie-Lackawanna Railroad Company, The Delaware and Hudson Railroad Corporation, and the Boston and Maine Railroad for inclusion in the Norfolk & Western system.

> Upon the filing of such petition or petitions, the attendant facts and circumstances will be appraised upon the basis of an appropriate record or records then to be compiled, and if the affiliation or affiliations then sought, or some reasonable modification thereof, be found consistent with the public interest, the Commission will direct the accomplishment thereof under such terms as may be found equitable to all parties involved. It is not intended that acceptance of this condition by applicants herein will foreclose or limit review of any decision of the Commission disposing of a petition filed pursuant to this condition.
>
> * * * * *
>
> Consummation by the applicants of any transaction approved herein shall constitute on the part of such applicants acquiescence in and irrevocable assent to the conditions stated in this appendix.

Thereafter, the merger and related transactions were consummated, without any person seeking judicial review of the Commission's report and order.[3]

E–L, D&H, and B&M, pursuant to this condition, have filed petitions for inclusion in the N&W system;

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[3] Another important condition to the Commission's approval was that PRR divest itself of its holdings of 30% of N&W voting shares which the Commission found gave PRR "power to control the Norfolk & Western" (324 I.C.C. at 33). PRR was allowed 10 years in which to dispose of the shares and in the meantime they were to be placed in three voting trusts to be approved by the Commission. PRR accepted this condition and has placed the shares in approved voting trusts.

hearings upon the petitions have been concluded, and a hearing officer's report has been served.

On October 11, 1965, N&W and C&O–B&O filed with the Commission an application for approval of their merger into a single system, and offering to include in their proposed system E–L, D&H, B&M, the Reading and the CNJ, subject to various important qualifications (*e.g.*, "Modification of present federal tax law to permit Norfolk to obtain the benefit of the operating loss carryovers of Erie-Lackawanna, Boston and Maine, Reading and Jersey Central.")

C&O is a 4,400-mile railroad, extending southeasterly from Michigan, through Ohio and West Virginia to Virginia, with 1965 railway operating revenues in excess of $396 million and net railway operating income in excess of $53 million. It controls the B&O pursuant to authorization granted by the Commission in 1962. *Chesapeake & O. Ry. Co.—Control—Baltimore and O. R. Co.*, 317 I.C.C. 261, sustained, *Brotherhood of Maintenance of Way Employes* v. *United States*, 221 F. Supp. 19 (E.D. Mich. 1963), aff'd mem., 375 U.S. 216.[4] Together C&O and

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PRR's cooperation was further required to make the merger possible through the sale of its line between Sandusky and Columbus, Ohio, to provide the missing physical connection between N&W and Nickel Plate.

[4] In that case, the Solicitor General advised this Court as follows (Memorandum for the United States, pp. 2–3):

"In his transportation Message to the Congress on April 5, 1962, President Kennedy directed the formation of an Interagency Committee on Transport Mergers for the purpose of formulating a merger policy for the Executive Branch and

B&O are the beneficial owners of 65 percent of the voting control of WM, actual control of which they seek to acquire by pending application filed with the Commission in June 1964. WM is a 741-mile railroad, extending from Connellsville, Pa., and Webster Springs, W. Va., to Baltimore, with 1965 railway operating revenues of nearly $51 million and net railway operating income of nearly $8.5 million.

B&O is a 5,500-mile railroad, operating from Chicago and St. Louis on the west to Rochester and Washington on the east, with 1965 railway operating revenues of nearly $400 million and net railway operating income in excess of $30 million. B&O owns a 38 percent voting interest in the Reading, which in turn controls the CNJ through ownership of 49 percent of its stock. Reading is a 1,200-mile railroad operating in eastern Pennsylvania, with 1965 railway operating revenues of in excess of $105 million and net railway operating income in excess of $8 million. By petition filed with the Commission, it has sought inclusion in the proposed N&W–C&O merger. CNJ is a 514-mile railroad, extending from Scranton to

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considering the merits of each pending transportation merger of significance. This Committee, of which the Assistant Attorney General, Antitrust Division, Department of Justice, is a member, has recently completed a study of the effects of this control transaction and of the two related pending merger applications involving eastern railroads [*i.e.*, N&W-Nickel Plate-Wabash and PRR–NYC]. As a result of this study, the United States is now of the view that the acquisition of control by the C&O of the B&O would serve the public interest in an improved eastern rail network which would provide economical and efficient transportation services. * * *" [Footnote omitted.]

Jersey City, with 1965 railway operating revenues of nearly $52 million and incurring a net railway operating deficit in excess of $3 million.

In No. 680, appellant is the D&H, a 696-mile railroad operating largely in eastern New York and extending from Wilkes Barre to Montreal, with 1965 railway operating revenues in excess of $42 million and net railway operating income in excess of $5.5 million. D&H, as E&L and B&M, has sought inclusion in the N&W, a possibility specifically held out as a condition imposed by the Commission in its approval of the merger of N&W and the Nickel Plate, *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, supra*, 324 I.C.C. at 32, 148, or, in the alternative, inclusion in the PRR–NYC system. *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 531, 553. B&M has not appealed from the lower court's decision.

In No. 691, appellant is the E–L, a 2,700-mile railroad lying between Chicago and New York, with 1965 railway operating revenues of nearly $230 million and net railway operating income in excess of $12 million.

In No. 813, the appellant is the City of Scranton, Pa., the Township of Weehawken, N.J., having dismissed its appeal with the consent of all parties. Scranton, with a 1960 population of about 111,000, is served by the E–L, D&H and CNJ. Mr. Milton H. Shapp (Shapp), suing as a PRR stockholder and a citizen of the Commonwealth of Pennsylvania, is the appellant in No. 814.

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Finally, in No. 815, appellant is the Chicago & Eastern Illinois Railroad Company (C&EI), a 744-mile railroad operating between Chicago and St. Louis and Evansville, with 1965 railway operating revenues of about $40.5 million and net railway operating income of nearly $3.5 million. On February 16, 1965, the Commission authorized Missouri Pacific Railroad Company (MoPac) to acquire control through stock ownership of the C&EI upon condition that MoPac acquire sufficient control of C&EI to cause it to negotiate with the Louisville & Nashville Railroad Company for the latter to operate over C&EI's Chicago to Evansville branch, subject to subsequent consideration and approval by the Commission. *Missouri Pacific R. Co.—Control—Chicago and Eastern Illinois R. Co.*, 327 I.C.C. 279. The Commission's order was sustained by a three-judge court (one judge dissenting) in *Illinois Central R. Co., et al.* v. *United States* (N.D. Ill., Civil Action No. 65–C–1393, opinion of August 4, 1966). Appeals to this Court are pending as Nos. 687, 688 and 689, and the opinion of the lower court and the report of the Commission are printed in the separate appendices to the jurisdictional statements. Thus, subject to the action of this Court, it is likely that C&EI will become a part of the much larger and stronger MoPac system (and possibly, in part, of Louisville & Nashville).

B. THE PROCEEDINGS BEFORE THE COMMISSION

By joint application, filed March 18, 1962, PRR and NYC sought Commission authorization under Section

5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), for the merger of their properties and franchises, the surviving corporation to be known as the Pennsylvania New York Central Transportation Company (Transportation Company). The applications were heard before two Examiners of the Commission, the hearing consuming 129 days between August 29, 1962, and October 2, 1963, and on September 16, 1964. The resultant record is one of the largest ever to have been compiled before the Commission, consisting of about 19,600 transcript pages of oral testimony and an approximately equal number of pages of prepared statements and exhibits.

In advance of the hearing or some time after it had begun, petitions for their inclusion in the Transportation Company, under subsection (d) of Section 5(2) of the Act, were filed by the Trustees of the New York, New Haven and Hartford Railroad Company (NH), undergoing reorganization pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. 205, the E–L, D&H and B&M. Briefs were filed June 1, 1964.

The position of the petitioning railroads, NH, E–L, D&H and B&M, essentially, was that as independent carriers they would be unable to withstand the adverse competitive impact of the Transportation Company and, accordingly, that the Commission should deny the merger application unless it provided for their inclusion in a major Eastern railroad system. NH sought inclusion only in the Transportation Company, stating that determination of the terms and

conditions of the inclusion should be left to the voluntary agreement of the applicants and the NH as a condition precedent to approval by the Commission of the application. As so conditioned, the NH said, the merger would satisfy the statutory standards. E–L, D&H and B&M were in agreement, on the other hand, that their inclusion in N&W would be preferable to their inclusion in the Transportation Company and urged that the proposed merger not be allowed to be consummated until their inclusion in N&W was assured or, in the alternative, such inclusion in the Transportation Company. D&H and B&M then had petitions for inclusion in N&W pending, but E–L did not, having withdrawn its previously filed petition in favor of voluntary negotiations.

N&W did not seek to participate in the Commission's proceeding until subsequent to its report and order of April 6, 1966. C&O, B&O and Reading, though parties to the proceedings, neither offered evidence nor submitted briefs in opposition to the merger proposal or the possible inclusion sought in the Transportation Company by the NH, E–L, D&H and B&M. WM participated in the hearing and on brief only to the extent of urging that the terms of a Traffic Protection Agreement between it, PRR and Pittsburgh & Lake Erie Railroad Company be imposed as conditions of the merger, as was indeed done by the Commission (327 I.C.C. 563). CNJ did not petition for leave to intervene in the proceedings until after the close of the hearing; and, while its petition was granted by the Commission, the CNJ's contemporaneous request for further hearing to enable it to produce

evidence to establish adverse effect through diversion by inclusion of the NH in the Transportation Company was denied.

Scranton offered only a single witness the purport of whose prepared testimony was to the effect that the E–L was of vital importance to the locality and Lackawanna County in which it is situated. As a carrier and as an employer, E–L rendered valuable service to the community any diminution of which would result in economic catastrophe to city and county. No brief was filed by Scranton. Shapp, then styling himself as a Philadelphia businessman and a "citizen" of Pennsylvania, testified and introduced an exhibit in opposition to the proposed merger, expressing his fear that it would spell the industrial demise of the State. No brief was filed by Shapp.

C&EI, through the testimony of its witnesses and the exhibits they sponsored and on brief, expressed its fear that the Transportation Company would be a more effective competitor for its traffic than NYC alone had been, and accordingly sought special routing and traffic conditions to minimize the diversion it anticipated.

The Department of Justice, at the conclusion of the hearing and on brief opposed the proposed merger.

In all, well in excess of 200 parties participated in the litigation of the case before the Commission, some in wholehearted support, others in wholehearted opposition to the merger proposal; most of the parties

believing, however, that, appropriately conditioned, the merger of the PRR and NYC would be consistent with the public interest. Among such were the States of Connecticut, Massachusetts, New Hampshire, New Jersey, New York, and Rhode Island. The unions represented by the Railway Labor Executives Association, which initially opposed the merger, as a result of later entering into an agreement with the applicants providing employee protection, neither supported nor opposed it.

On March 29, 1965, the Examiners served their recommended report consisting of four hundred forty-six single-spaced pages, exclusive of appendices.

The Examiners dwelled upon the unmistakeable decline of the eastern railroads in general and the impairment of the financial strength of the PRR and NYC in particular. At page 401 of their report, the Examiners concluded:

> From a financial standpoint of the seven major Class I carriers intimately involved in this proceeding, the operations of only one (D&H) is slightly more than marginal. Of the remaining six, one (N.H.) is in bankruptcy and near liquidation; three (B&M, E–L and NYS &W) have experienced deficits for some time and are presently hovering on the brink of bankruptcy; and two (P.R.R. and N.Y.C.) have existed as viable corporations for the past 12 years solely on the basis of returns from other investments made in an era when railroads dominated the transportation scene.
>
> From a traffic and revenue standpoint, every evidentiary factor indicates a long-range decline broken only by normal cyclical variations

> and under existing circumstances, no prudent justification exists for expecting a radical recovery from this long-range trend. In the latter respect, we are not unmindful of the improvements in the financial, traffic and revenue pictures of certain of the above-carriers since 1961, and that estimated returns for 1964 indicate that the upper limits of mathematically computed projections may have already been exceeded. However, considering the lack of heretofore normal cyclical recessions in business conditions since 1958, there indeed would be little hope for improvement in this industry through merger or any other constructive action if such results were not achieved.

The Examiners saw in the proposed merger of PRR and NYC a means by which they might at least partially stem their economic decline. At page 405 of their report, they concluded:

> The proposed merger clearly does not provide a panacea for the ills attending applicants or the rail industry in the East. It does, however, provide a vehicle through which at least one or more of the external pressures which have had such disastrous effects upon these roads can be minimized. Insofar as it will permit the merged company to operate more efficiently and reduce costs, it will provide them a greater return by which they can attract capital and maintain essential services needed by the nation's economy. To the extent it permits the merged company to improve service and reduce rates, the latter will be able to maximize its inherent advantage in its relationship to other modes.

In recommending the proposed merger, subject to specified conditions, the Examiners noted that there was no evidence of adverse affect upon C&O, B&O, WM and CNJ as a result of the merger and the C&EI would not be injured materially or at least not to such an extent that its ability to provide adequate transportation service would be threatened. Page 409. The examiners concluded that the NH should be included in the Transportation Company, but only to the extent necessary to protect it from the adverse effects flowing from the merger, namely, the freight operations. With respect to the E–L, D&H and B&M, the Examiners would have denied their applications for inclusion in the Transportation Company as a condition precedent to its formation. However, they would have imposed a condition upon the merger transaction allowing these roads any time within 10 years to renew their requests for inclusion upon a showing, first, that inclusion in the N&W had been foreclosed and, second, that just and reasonable terms for the inclusion in the Transportation Company can be devised.

C&EI, the Examiners felt, had "overestimated the extent to which the merged company can improve its service in the area in which it would compete with C&EI; underestimated the superiority of its own service; and overlooked the fact that the merger will not provide the resultant company with any new channels of trade in the territory served directly by C&EI." Page 321. Recognizing that the Commission had authorized C&EI's control by the MoPac,

the Examiners imposed some of the conditions sought by C&EI and declined others.

Finally, with respect to the arguments advanced in opposition to the proposed merger by some of the communities fearing a tax and employment loss as a result of the merger, the Examiners concluded that under the statutes administered by the Commission these considerations are of no moment in providing for the financial needs of the carriers and their ability and those of competing carriers to render an economic and efficient transportation service to the public.

On balance, then, the Examiners concluded that, as conditioned, the merger of the PRR and NYC should be approved as consistent with the public interest. With respect to the timing of the transactions, the Examiners, at page 417 of their recommended report, specifically found:

> [T]o delay consummation of the instant merger pending a change in the E–L's financial condition, so that terms and conditions for its inclusion into N&W can be drafted, may be too long in coming and too expensive, not only to the many carriers whose economic life is largely dependent on the outcome of the instant merger proceeding, but to the numerous shippers and communities which are dependent upon them. * * *

Again, at page 418 of the report, the Examiners found with respect to the timing of the transactions:

> [W]e believe an indefinite delay in consummation here would have a broader and more direct affect upon applicants, those carriers depend-

> ent upon this merger and shippers and communities served by it. In other words, the major injury caused by delay clearly outweighs the smaller caused by consummation as soon as possible.

Exceptions to the Examiners' report and recommended order were filed July 14, 1965, and reflected no material changes in the position of these parties. C&O and B&O, which so far had stood mute in the proceedings, continued their silence, and Scranton, which had participated only to the extent of offering the prepared testimony of a single witness, also did not except to the report. The C&O–B&O affiliated lines, WM, Reading and CNJ, filed separate exceptions, addressed primarily to the asserted want of evidentiary support for the Examiners' recommendation that PRR grant D&H trackage rights between Wilkes Barre and Hagerstown and the fear of diversion of traffic that D&H's direct access to the N&W would have upon them. CNJ additionally cited as error the Examiners' failure to appraise the adverse effect upon it of the projected improvements of the Transportation Company and their recommended inclusion of the New York, Susquehanna and Western Railroad Co., another road which had sought inclusion. E–L, D&H and B&M persisted in their resistance to approval of the PRR–NYC merger without contemporaneous provision for their inclusion in N&W or the Transportation Company. Shapp continued to press, as he put it, that "[t]he recommended report in this proceeding puts its stamp of approval upon the greatest disaster facing the Com-

monwealth of Pennsylvania and the City of Philadelphia since the opening of the Erie Canal in 1825." Finally, the Department of Justice, while adhering to its earlier stand, did not except specifically to the report and recommended order of the Examiners but urged that, should the Commission nevertheless approve the proposed transaction, it should require the Transportation Company to take over the passenger, as well as the freight, operations of the NH and that "[c]onsummation of the merger should be delayed for at least eighteen months following approval, to enable the Boston & Maine, the Delaware & Hudson, and the Erie & Lackawanna roads to apply for affiliation with one of the major systems, presumably the Norfolk & Western."

It was against this background, the widespread concern for the ability of the E–L, D&H and the B&M to withstand the adverse impact upon them of a merger of the PRR and NYC and the filing, in the interim, of a petition by E–L again seeking inclusion in the N&W, that the Commission entered its report of April 6, 1966, and prescribed extraordinary traffic and indemnification conditions to protect them from injury that might be occasioned by the merger of the PRR and NYC pending the inclusion of the E–L, D&H and B&M in the N&W or the Transportation Company.[5]

[5] In its report (327 I.C.C. at 481–482) the Commission adopted as its own the hearing officers' report, to the following extent:

"The initial report provides a detailed and adequate account of the applicants, their finances, operations, and proposed merger, the positions of interveners, and the general background and effects of the transaction, except for certain matters

The Commission deemed that the merger proposal, as conditioned by it, would be consistent with the public interest. Its approval of the proposed transaction proceeded, generally, on the premises, first, that over a recent representative period both PRR and NYC had wholly inadequate earnings from their railroad operations and, second, that their consolidation when finally affected would enable them to achieve savings in excess of $80 million a year to the applicants and improved service to the large number of shippers whom they serve. At 327 I.C.C. 501–502, the Commission found:

> We believe that with approval of this merger many problems facing the applicants will be resolved to a considerable degree. Applicants have shown that their annual savings from the merger will exceed $80 million after about 8 years. See, pp. 131–155 of the initial report. These large operating savings will go far toward compensating for the persistently low rates of return, and the increased earnings flowing from the merger should motivate the unified company to accelerate investments in

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hereinafter noted which arose after the hearings. All interested parties have been served with that report, and (except for the portion preceding page 7—most of which has been repeated here) it will be attached to the report bound in printed form in the permanent series of Interstate Commerce Commission reports. Therefore, the detailed factual matter stated therein will not be repeated here. We adopt the examiners' account of the facts, since no material exceptions were taken thereto, most exceptions having been directed at the conclusions. Also adopted are those conditions, findings and conclusions of the hearing examiners (including those pertaining to procedural and evidential matters) which we do not here modify or reject. * * *" [Footnotes omitted].

> transportation property and continually modernize plant and equipment. This in turn should enable the unified company to more fully develop and utilize the inherent advantages of railroad transportation in the territory served, and provide more and better service, all to the ultimate benefit of the public.

Much of the Commission's long and detailed report of April 6, 1966, is devoted to analysis of and concern for the competitive effects of the proposed merger upon other Eastern railroads, particularly the NH, E–L, D&H and B&M. As to the N&H, the passenger, as well as the freight operations of which the Commission ordered included in the Transportation Company, the Commission, 327 I.C.C. at 522, found:

> Without some radical change in circumstances, even if this merger application were denied, NH would face a nearly insuperable task in bringing itself out of bankruptcy. The Transportation Company, with new routings and improved service, could undoubtedly wean substantial traffic away from NH and leave that already moribund carrier in perhaps an irretrievable situation.

Turning to E–L, D&H and B&M, the Commission noted that in 1964 it had approved the N&W-Nickel Plate merger (and of the Wabash Railroad Company lease) upon the condition that within five years E–L, D&H and B&M would be entitled to petition for inclusion in the N&W system upon terms found by the Commission to be equitable. *Norfolk & W. Ry. Co. and New York, C & St. L. R. Co. Merger, supra.* The Commission noted that they had so petitioned, and that the Commission had completed hearings on their

petitions, and then was awaiting the hearing officer's report.

In the instant report, the Commission recognized that the very savings and improved service which justify the PRR–NYC merger meant that "a substantial amount of traffic could be diverted from E–L, D&H, and B&M" (327 I.C.C. at 531). Thereupon the Commission did two things: First, as revised in its supplemental report of September 16, the Commission provided that within one year after a final denial of a petition of E–L, D&H or B&M for inclusion in the N&W system, such railroad could petition the Commission for inclusion in the Penn-Central system if found by the Commission to be consistent with the public interest and upon just and reasonable terms. In other words, the Commission has kept open doors for inclusion of E–L, D&H and B&M in either the N&W system or the Penn-Central system.

Second, the Commission went on to state (327 I.C.C. at 532) that "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger." To provide such interim protection for E–L, D&H and B&M, the Commission, in addition to the usual conditions for the preservation of existing routes and gateways, Appendix I, 327 I.C.C. at 564–5, prescribed in Appendix G to its report (at p. 561) unprecedented protective conditions. These conditions fall into two categories:

(1) They would require Penn-Central to maintain the rate and routing situation on traffic as to which E–L, D&H and B&M are competitive factors—as though there were no Penn-Central merger; a Commission-administered machinery is provided to enforce these conditions; (2) Appendix G and the report (at pp. 532, *et seq.*) further provide for:

> * * * the payment of an indemnity by the Transportation Company to E–L, D&H and/or B&M whenever, in a given year, the revenues of E–L, D&H and B&M are, as to each of them, proportionally less than the combined revenues of each protected carrier and the Transportation Company, as computed on the basis of the relationship existing between such revenues for the year 1964; * * *

With E–L, D&H and B&M thus protected against the impact of the PRR and NYC merger, the Commission perceived no reason for deferring the consummation of the transaction conditionally approved by it. Indeed, the precariousness of the NH, involved in reorganization proceedings and aided by the cash subsidies of the States through which it operates, as well as the needs of the merging carriers and the benefits to the public they serve, dictated otherwise.

Nevertheless, petitions for reconsideration of the report of the Commission were filed; most notably they came from the parties now appellants before the Court.

Criticism of the so-called Appendix G conditions imposed by the Commission centered largely upon their novelty and their having been imposed by the

Commission without there having been a hearing upon them. The so-called protected roads, E–L, D&H and B&M, moreover challenged the validity of the indemnification conditions for the method of their computation and their not having provided for capital loss indemnification, that is, an amount representing the capitalized annual reduction in earnings that would be occasioned by the PRR–NYC merger notwithstanding the inclusion of these roads in N&W. N&W at that point petitioned for leave to intervene and reconsideration, it in the meantime having advanced its proposal for merging with C&O. C&O and its affiliated lines, B&O, Reading, and CNJ similarly petitioned for reconsideration.

The import of their pleadings was that the traffic or revenue indemnification condition served to establish a community of interest between the protected roads and the Transportation Company which would motivate a routing over the lines of the merged company to the detriment of the other roads. Similar and other grounds for reconsideration were given by C&EI and by various municipalities, of which only Scranton remains before this Court. The only attack upon the merits of the merger proposal came from Shapp. As relevant herein, the Department of Justice urged reconsideration and rehearing only as to the Appendix G conditions. Such was the posture of the proceeding when the first of the suits was brought.

C. THE PROCEEDINGS IN THE COURT BELOW

While the petitions for reconsideration of the Commission's order of April 6, 1966, were still pending before the Commission, and with the effective date of the Commission's order being September 30, 1966, the present appellants filed their complaints in the court below. E–L criticized the Appendix G protective conditions as inadequate and complained of the lack of hearing on such conditions. It further contended that the Commission's findings as to the benefits of the merger and the inclusion of NH were insufficient to justify early consummation of the merger.

D&H, intervening in E–L's case, also complained of the lack of a hearing on the Appendix G protective conditions and attacked the adequacy of the conditions. D&H also contended that the Commission erred in approving the merger without "assuring inclusion of the D&H and other independent railroads in one or another of the major Eastern railroad systems when the Penn-Central merger is consummated", in failing to condition its approval of the merger upon a requirement that the merged company compensate D&H for any loss in value to the N&W system, if ultimately D&H is included therein, caused by the diversion of D&H traffic to the Penn–Central system, and in failing to make findings as to the effect of the merger upon N&W, C&O, Reading, and CNJ.

B&M also intervened as a plaintiff in the E–L case, attacking the Appendix G conditions as inadequate "although the B&M regards the indemnity concept of Appendix G as essentially sound and correct", asserting that there must be "assurance that the 'essential' service of the B&M would be preserved" by including the B&M in a major Eastern rail system, prior to consummation of the Penn-Central merger, and repeating the claim of D&H that the Commission had erred "in failing to condition approval of the Penn-Central merger on indemnity to the B&M from the Penn-Central for any loss in B&M's value to the N&W, as a result of the Penn-Central merger, if ultimately B&M is included in the N&W".

In a separate action, B&O, C&O and N&W joined in a complaint alleging (1) that the Appendix G conditions were invalid for lack of hearing and findings, a "pooling" of revenues unlawful unless approved with the findings required by Section 5(1), as subject to modification by agreement without approval by the Commission, and that the indemnity conditions of Appendix G "creates an immediate community of financial interest between [E–L, D&H and B&M] and the Penn-Central system which will divert a substantial amount of traffic and revenues from the plaintiffs, and (2) that the Commission erred "in refusing to reopen the record to receive evidence with respect to the Pennsylvania's efforts to control the Norfolk and Western since the close of the record and the results of those efforts".

The complaints of Reading, CNJ and WM generally reiterated allegations of the other complaints attacking the Appendix G conditions and asserting that the PRR was attempting to control N&W. These plaintiffs further alleged that the Commission erred in requiring inclusion of the NH in the Penn-Central merger without imposing conditions to protect them from diversion of traffic which they presently interchange with NH.

C&EI intervened as a plaintiff, also attacking the Appendix G conditions and alleging that the Commission had erred in not adopting all of the conditions which C&EI had proposed for its protection against certain consequences of the proposed merger.

The position of the plaintiff-appellant railroads as to the Appendix G conditions for the protection of E–L, D&H and B&M may be summarized as follows: E–L, D&H and B&M attacked them as inadequate to protect them against substantial diversion of traffic to a merged Penn-Central; the other railroad plaintiffs (N&W, C&O, B&O, WM, Reading, CNJ and C&EI) attacked from almost the opposite direction—that the indemnity conditions would create a community of interest between E–L, D&H and B&M and PRR–NYC which would result in a substantial diversion of traffic from such other railroads. A most remarkable feature of this case is that no one of the plaintiff-appellant railroads attacked the proposed Penn-Central merger on its merits—none challenged the Commission's basic findings which led it to conclude

unanimously that the merger would be "consistent with the public interest".[6]

The intervening complaint of Jersey City (joined in at the hearing in the court below by Weehawken, Union City, North Bergen, West New York, and Hoboken) is no longer relevant since none of those communities have appealed to this Court.

Appellant Shapp intervened as a "citizen" and as a stockholder of PRR, broadly challenging on the merits every conceivable aspect of the Commission's decision. In obvious cooperation with Shapp, the Borough of Freedom and the City of Scranton, Pennsylvania, intervened as plaintiffs making essentially the same contentions.

All of the foregoing plaintiffs sought a temporary restraining order and a preliminary injunction staying consummation of the proposed merger which, under the September 30 effective date of the Commission's order, could have taken place on October 1. A three-judge court was designated, consisting of Circuit Judge Friendly and District Judges Weinfeld and Levet, which ordered a hearing before it on September 21 on the applications for preliminary injunctions.

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[6] Indeed, appellants C&O and B&O told the Commission in their petition for further hearing that:

"A merged Penn-Central will generate large savings and touch off a significant drive for the type of broad-gauge service improvements which is the very purpose of the merger. There will be funds available for the acquisition of additional equipment, including special equipment, for the improvement of track facilities, for the speeding of service * * * C&O–B&O believe that basically that merger will be consistent with the public interest, notwithstanding the substantial adverse affect that it will have on their traffic and revenues."

On September 19, the Commission released and served its Report on Reconsideration treating with the various petitions for reconsideration and rehearing which had been addressed to its original report and order of April 6.

The Commission's Report on Reconsideration changed substantially the shape and posture of the issues before the court below. As to the allegations of N&W, C&O, B&O and Reading that PRR was attempting to control N&W and the proceeding should be reopened for further hearing on that issue, the Commission stated that it retains complete jurisdiction in the N&W-Nickel Plate merger proceeding over the divestiture of PRR control of N&W and that, without reopening the present proceeding, "we * * * shall promptly investigate to determine whether any additional formal or informal action by the Commission is warranted" (328 I.C.C. at 316; J.S. B–21). This claim has not been further litigated in this case.

N&W, C&O and B&O had complained that paragraph 6 of Appendix G to the Commission's original report had authorized Penn-Central and E–L, D&H and B&M to enter into agreements superseding the protective conditions of Appendix G—without approval by the Commission. In its Report on Reconsideration, the Commission provided that "no such agreement may be put into effect until it has had the specific approval of this Commission" (328 I.C.C. at 329; J.S. B–44).

The most important aspect of the Commission's decision on reconsideration in relation to these appeals was its reopening the proceeding for further

hearing limited to the special traffic and indemnity conditions in Appendix G to its April 6 report. The present special traffic conditions would remain in effect (assuming consummation of the merger) during the further proceeding. The indemnity conditions were rescinded, but the Commission stated that "any provision which may be decided upon for the payment of indemnities will be made applicable retroactively to the date the merger is consummated" (328 I.C.C. at 329; J.S. B–44). The Commission also ordered further hearing on the contention of D&H and B&M that the merged company should be required to indemnify them for any loss in value (capital impairment) attributable to the merger if they should be included in the N&W system. The Commission further provided that consummation of the merger "will constitute irrevocable assent on the part of the applicants to any modification" of the traffic and indemnity conditions of Appendix G which results from the further hearing. However, the Commission stated that "consummation of the merger will not foreclose or limit court review of any decision the Commission may make in regard to the capital indemnity issue" (328 I.C.C. at 329; J.S. B–43).

At the same time, notwithstanding its action in reopening the proceeding for further hearing limited to the traffic and indemnity conditions and the claim for capital indemnification and in rescinding the indemnity conditions, the Commission concluded that

"the public interest requires prompt consummation of the proposed merger" (328 I.C.C. at 313; J.S. B–16).

The Commission's action on reconsideration rendered moot the contention of many plaintiffs that they were entitled to a hearing on the Appendix G conditions. And since it not only set for hearing the indemnity conditions but also rescinded them pending such further proceeding, it mooted all of the attacks upon them by the railroad plaintiffs. Instead, the principal issue before the lower court became whether the Commission was warranted in authorizing consummation of the Penn-Central merger prior to final determination of the special conditions for the interim protection of E–L, D&H and B&M. With this in mind, the court below permitted the filing of further briefs subsequent to its hearing on September 21, and stayed consummation of the merger until its further order.

We have heretofore set forth the positions of the plaintiffs in the court below. However, it should be noted that the applications for a preliminary injunction were opposed not only by the Commission and the applicants but also by the following intervening defendants: the States of New York, Connecticut, Massachusetts and Rhode Island, the cities of New York and Philadelphia, Richard Joyce Smith and William J. Kirk as Trustees of the Property of the New York, New Haven and Hartford Railroad Com-

pany, and the Chambers of Commerce of Greater Philadelphia and Pittsburgh.

The Department of Justice informed the Court below that it was neither supporting nor opposing the applications for a preliminary injunction but did not otherwise participate in the cases.

On October 4, 1966, the court below, in an opinion by Judge Friendly, Judge Weinfeld dissenting, denied the motions for a preliminary injunction. In so doing, the court applied the four criteria of *Virginia Petroleum Jobbers Ass'n.* v. *FPC,* 259 F. 2d 921 (D.C. Cir. 1958), as it stated that it would do at the outset of its hearing without invited objection from any party.

The court below first held that the complaints of Shapp and the Borough of Freedom and the City of Scranton, "the only parties attacking the merger as such, afford no warrant for a temporary injunction, since they fail on all the points listed" (J.S. A–17).

Next, the court concluded (*ibid.*) that "We likewise can discern no likelihood of success on the merits in claims that consummation of the merger should be deferred until conclusion of all pending rail merger proceedings relating to the northeastern United States, * * *. Decision whether to handle all these consolidations in one giant proceeding or in several rests in the sound judgment of the Commission subject only to its management of the various proceedings so as to promote an ultimate solution fair to the carriers and consistent with the public interest, a task in which it has displayed considerable ingenuity."

Noting the Commission's findings, "with ample supporting evidence", that the merger would produce substantial benefits both to the applicants (annual savings of $80,000,000) and to the shipping public (improved service), the court below concluded that "The third and fourth factors cited as governing the exercise of our discretion, damage to the defendants and to the public, weigh heavily against the grant of a temporary injunction, * * *" J.S. A–19).

Turning to application of the first two criteria (likelihood of success and irreparable injury without interim relief), the court below rejected contentions that to permit consummation of the merger without first prescribing special protective conditions for E–L, D&H and B&M, violates the provision of Section 5(2)(b) of the Interstate Commerce Act that in approving a merger the Commission "shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable". Thereupon, the court below took into account such factors as the likelihood that the Commission could devise fair and adequate conditions (J.S. A–26), the time by which litigation over conditions could delay consummation (J.S. A–32, 33), the delayed effects of a merger of great size and complexity (J.S. A–30), and its considered conclusion that prior consummation would not deprive appellant carriers of effective judicial review of any conditions which may be prescribed (J.S. A–33–36). The court below summarized its balancing of the controlling criteria, as follows (J.S. A–37–38):

> Since all affected carriers are thus to have a further expedited hearing before the Commission with respect to protective conditions, since the Transportation Company concedes it is precluded from seeking review of any new traffic or financial conditions in favor of the three roads resulting from the reconsideration (save as to impairment of capital values) and since all roads are assured of judicial review of the protective conditions ultimately imposed as effective as is now available, we find no sufficient basis for delaying for a year or more the public and private benefits from the merger found by the Commission and recognized by the plaintiff carriers themselves. * * * In this truly unique case, where there is no substantial dispute over the ultimate merits of a commission-approved merger and the sole significant legal issue is the propriety of consummation before the protective conditions have been completely determined, judicial responsibility is limited. * * *

The lower court provided that its restraining order should remain in effect until October 7 to give plaintiffs an opportunity to make application for a stay of consummation of the merger to the Circuit Justice, and upon timely application, until direction by the Circuit Justice or this Court. Applications for stay having been filed with Mr. Justice Harlan and by him referred to the Court, consummation of the merger was stayed by this Court's order of October 18, 1966.

SUMMARY OF ARGUMENT

I

This is a unique case in that the merits of the proposed Penn-Central merger, *i.e.*, whether it will be "consistent with the public interest" under Section 5(2) of the Interstate Commerce Act, are not challenged by any of the appellant railroads. Moreover, the Department of Justice has advised this Court that "the agencies of the Executive Branch that have substantive responsibilities for the formulation of economic and transportation policy believe that the merger is in the public interest and that its consummation should be promptly effected".

A. The court below was clearly correct in sustaining the Commission's decision to permit consummation of the merger before it had finally determined the inclusion of E–L, D&H and B&M in a larger rail system. From 1920 to 1940, Congress sought to bring about the consolidation of railroads "into a limited number of systems" by authorizing the Commission to approve carrier-initiated proposals consistent with "the complete plan of consolidation" which the Commission was directed to prepare. As this Court has recognized, the "plan" approach failed and was abandoned in favor of the present Section 5(2) of the Interstate Commerce Act. *Schwabacher* v. *United States*, 334 U.S. 182, 193 (1948). Section 5(2) authorizes the Commission to approve carrier-initiated consolidations which it finds to be consistent with the public interest and upon just and reasonable terms. The only initiative given to the Commission is its authority under Section 5(2)(d) to condition its approval upon

the inclusion of other railroads in the territory involved.

The Commission has consistently refused to consolidate all of the Eastern rail merger applications into a single vast proceeding, although urged to do so by the Department of Justice and others, because, lacking powers of initiative and compulsion, such consolidation would involve the problems of the discarded plan approach. The Commission has been sustained in its approach. *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19, aff'd mem., 375 U.S. 216 (1963). The Congress, given detailed information and criticism as to the Commission's refusal to consolidate the Eastern merger applications, has declined to interfere with the determination of those applications.

In declining to defer consummation of the merger indefinitely, the Commission did not abuse its broad discretionary power as to whether to consolidate proceedings. It took into account the substantial benefits of the merger which would be deferred by a delay in consummation. It noted that, exercising its inclusion powers under Section 5(2)(d), it had provided opportunities for the subsequent inclusion of E–L, D&H and B&M in either the N&W system or the Penn-Central. The Commission conditioned its approval of the Penn-Central merger upon the inclusion of the vital freight and passenger operations of the bankrupt New Haven, and the applicants have accepted this condition. No other solution has been proposed to insure the continuance of New Haven's services. The Commission concluded that, if it deferred con-

summation of the merger, it could not be assured that it would ever take place. It was a clearly reasonable exercise of discretion for the Commission to conclude that it should not thus risk the only New Haven solution.

B. The Commission found in its report and order of April 6, 1966, that the proposed merger would have a substantial impact upon E–L, D&H and B&M pending their inclusion in a large rail system. Accordingly, the Commission prescribed unprecedented interim traffic and indemnity provisions to protect them against diversion of traffic to the merged Penn-Central. At the request of the appellants, the Commission ordered a limited further hearing on these conditions, leaving the traffic conditions in effect and providing that any indemnity provision would be retroactive, but authorized prompt consummation of the merger. We submit that the court below did not err in refusing to enjoin consummation of the merger until the Commission had finally determined the interim protective conditions.

In exercising its inclusion powers under Section 5(2)(d), the Commission may condition its approval of a rail merger by reserving the power to require the inclusion of other railroads subsequent to consummation of the merger. Where, as here, the Commission has thus preserved opportunities for the subsequent inclusion of E–L, D&H and B&M in the N&W system or the Penn-Central system, surely it possesses the ancillary power to reserve for further prompt reconsideration, while permitting consummation of the Penn-Central merger, the special conditions for

their protection in the interim between consummation and their inclusion in a larger system.

Since no principle of law requires that each of the rail appellants must be guaranteed 100 percent protection against any diversion of traffic to the merged company, the court below properly refused to assume that it was likely that the Commission would be unable to devise conditions which would be fair both to E–L, D&H and B&M and to the appellants in No. 642. In declining to defer consummation, the Commission noted, and the court below concurred, that the implementation of the merger would be such a vast and complex matter that its competitive impact on other railroads would be delayed and gradual. In the meantime, as the court below noted, the Commission ordered the further limited hearing (since completed) on the conditions, and Penn-Central have agreed to accept without judicial review whatever traffic and revenue indemnity conditions the Commission may prescribe. There is no merit to the contention of the appellants in No. 642 that any form of indemnity would constitute "pooling" within the meaning of Section 5(1). Under the circumstances, the court below was clearly correct in holding that none of the appellants had made a sufficient showing that they would be subjected to irreparable injury in the interval between consummation of the merger and the Commission's prescription of interim protective conditions.

The court below correctly found that consummation of the merger would not deprive the railroad appellants of opportunity for effective judicial review of the protective conditions when determined by the

Commission. The appellants' contrary contention simply points up, as noted by the court below, that they seek to enjoin consummation of the merger until the completion of judicial review of the protective conditions to be prescribed by the Commission. Again, with such a substantial and indefinite delay in consummation of the merger, there can be no assurance that it will take place and its substantial benefits realized.

II

The appellant Shapp, unlike the railroad appellants, challenges the merits of the proposed Penn-Central merger in numerous respects. Shapp appears as a citizen of Pennsylvania, a stockholder of PRR and a participant in the proceedings before the Commission. His participation in the Commission proceeding does not confer upon him standing to challenge the Commission's order. *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479, 486 (1930). As a stockholder of PRR, he has standing to raise only issues involving the interests of stockholders *per se,* such as the fairness of the merger terms—which he does not do. *Pittsburgh & W. Va. Ry.* v. *United States, supra*; *Allegheny Corp.* v. *Breswick & Co.,* 353 U.S. 151, 174–175 (1957). As a citizen of Pennsylvania, Shapp lacks standing. *Moffat Tunnel League* v. *United States,* 289 U.S. 113 (1933).

III

The City of Scranton attacks the merits of the proposed merger upon substantially the same grounds as Shapp. Scranton's contentions are wholly without

merit, and are made following such fragmentary participation in the Commission's proceeding as to cast doubt on whether they are maintained seriously.

ARGUMENT

I. The Court Below Did Not Err in Sustaining the Commission's Decision to Permit Consummation of the PRR-NYC Merger Before It Had Finally Determined the Inclusion of E–L, D&H, and B&M in a Larger Rail System and While It Was Giving Further Consideration to Special Conditions for the Protection of Those Railroads Pending Such Inclusion.

The "truly unique" feature of this case is that the merits of the proposed Penn-Central merger, *i.e.*, whether it will be consistent with the public interest, are not challenged by any of the appellant railroads (or by the Department of Justice). Indeed, the Department advises that "the agencies of the Executive Branch that have substantive responsibilities for the formulation of economic and transportation policy believe that the merger is in the public interest and that its consummation should be promptly effected" (Memo., p. 21). As we point out hereafter, the proposed merger is challenged on its merits only by Shapp, who lacks standing to raise such issues, and by the City of Scranton, whose role (assuming standing) has been so uncertain and dubious as to create serious doubt that its contentions are seriously maintained. Thus, the principal issue in this case is relatively narrow—did the court below err in sustaining the Commission's decision to permit consummation of the Penn-Central merger while conducting the limited further hearing and reconsideration as to the special conditions which it has prescribed for the protection

of E–L, D&H and B&M pending determination of their petitions for inclusion in a large Eastern rail system. However, we believe that it will be useful to discuss first the contention of the Department of Justice (and only by the Department) that consummation of the merger should be further deferred until the Commission has arrived at a decision on the petitions of E–L, D&H and B&M for inclusion in the N&W system.

A. The Commission did not abuse its discretion in refusing to delay consummation of the PRR–NYC merger until it had determined the applications of E–L, D&H and B&M for inclusion in a major rail system.

The Department of Justice, alone among the appellants, urges that there should be no consummation of a Penn-Central merger until after "the completion of the proceedings to determine the place of the lesser roads" (Memo., p. 22), that is, until after it has been finally decided whether E–L, D&H and B&M should be included in the N&W system, in the proposed N&W–C&O–B&O system or in a Penn-Central system.[7] "Indeed," says the Department of Justice, "a solution to the serious financial condition of these roads" is "an important reason why consolidation [of the various merger and inclusion proceedings] is supported". The Department's position, we submit, notwithstanding its embarrassed disclaimer (Memo., p. 21), would be a return to "a

[7] The Department also is alone in suggesting that the Commission and lower court erred in allowing the Penn-Central merger "before interim protective conditions for the benefit of those smaller roads—and others, notably the New Haven—had been finally settled [Footnote omitted]". Memo., pp. 19–20.

'master plan' for railroad unification in each region" as was unsuccessfully tried under the Transportation Act of 1920, and would probably preclude the consummation of any major rail unification, regardless of its merits.[8]

Prior to 1920, railroad unifications were subject to the general antitrust laws. *Northern Securities Co.* v. *United States,* 192 U.S. 197 (1904); *United States* v. *Southern Pacific Co.,* 259 U.S. 214 (1922). This Court has recognize repeatedly that the Transportation Act of 1920 represented a sharp change in Congressional policy toward the structure of the railroads. Thus, in *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 80-81 (1944), this Court said:

> The national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the nation's transportation facilities beginning with the Interstate Commerce Act of 1887. For present purposes it is not necessary to trace the history of those attempts in detail other than to note that the Transportation Act of 1920 marked a sharp change in the policies and objectives embodied in those efforts. "Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates"; and emphasis on the preservation of free competition among carriers was part of that effort. The Act of 1920 added "a new and important object to previous

[8] The issue advanced by the Department was not presented by it to the Commission in urging reconsideration of the report and order of April 6, 1966, nor to the lower court. An issue not presented by the appeals, the matter is not properly before this Court. Rule 40.1(d)(2) of the Rules of this Court.

interstate commerce legislation." It sought "affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country." *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, 478; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. Ry. Co.*, 270 U.S. 266, 277. And in administering it, the Commission was to be guided primarily by consideration for "adequacy of transportation service, * * * its essential conditions of economy and efficiency, and * * * appropriate provision and best use of transportation facilities * * *" *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25.

The Transportation Act of 1920 directed the Commission to "prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems." 41 Stat. 481. The Commission was authorized to approve a proposed consolidation of two or more railroads upon finding that the transaction was "in harmony with and in furtherance of the complete plan of consolidation" and that "the public interest will be promoted by the consolidation". *Id.* In the formulation of the plan the Commission was admonished that "competition shall be preserved as fully as possible."

The objective of the 1920 Act for extensive voluntary railroad consolidations into a limited number of systems as pre-defined by the Commission was not realized. *Schwabacher* v. *United States*, 334 U.S. 182, 193 (1948); *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 315 (1954). The problem was essentially procedural in that the initiation of unifi-

cation was left wholly to the carriers—Congress having refused repeatedly to authorize the Commission to compel mergers. While the Commission had formulated plans, it was totally unable to determine the rail unification problems of a given region in a single coordinated proceeding.

The Congressional approach to rail unification culminated in the Transportation Act of 1940, in which the Congress not only again rejected proposals for compulsory consolidation of railroads, but also abandoned the attempt to channel voluntary consolidation into predetermined rail systems. Instead, Section 5 was amended into substantially its present form to authorize the Commission to approve carrier-initiated proposals which it found to be consistent with the public interest and upon just and reasonable conditions. The only "planning" power given to the Commission lies in the provision of Section 5(2)(d) empowering the Commission to condition its approval upon the inclusion of other railroads in the territory involved which request such inclusion. In *County of Marin* v. *United States*, 356 U.S. 412, 417–418 (1958), in characterizing the 1940 revision of Section 5, this Court emphasized that "the result of the Act was a change in the *means*, while the *end* remains the same. The very language of the amended 'unification section' expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplication".

This Court long ago recognized that when the Congress delegated vast and complex responsibilities to

the Commission, "Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed." *New England Divisions Case,* 261 U.S. 184, 197 (1923). In fact, the Congress was specifically informed that the Commission was not determining the Eastern rail unifications in a vast consolidated proceeding. This was developed in detail in 1962 hearings before the Senate Judiciary Subcommittee on Antitrust and Monopoly on S. 3097, 87th Cong., 2d Sess., which would have imposed a moratorium on major rail mergers. It was discussed critically in the report of the Subcommittee, entitled *The Railroad Merger Problem* (Feb. 26, 1963) under the heading "The danger of the piecemeal approach to merger approval". With such information and criticism before the Congress, no such bill has even been reported out of committee.

The Department's position before this Court is simply a continuation of its contentions, advanced unsuccessfully before the Commission in the C&O–B&O and N&W–Nickel Plate cases, repeated with no evident effect before the Congressional committee considering the rail merger legislation and argued unsuccessfully before the three-judge district court in *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19 (E.D. Mich. 1963), aff'd mem., 375 U.S. 216. In urging that the Commission should have consolidated into a single gigantic proceeding the entire Eastern merger situation, *i.e.*, the C&O–B&O control, N&W–Nickel Plate merger and Penn–Central merger proceedings, the Department was not joined,

indeed, it was opposed by the present appellants, N&W, C&O, B&O and E–L.

The Commission consistently has refused to consolidate the Eastern railroad merger or control proceedings. It held in the C&O–B&O control case that the serious injury to B&O that postponement of C&O's financial assistance would occasion, coupled with the lack of substantial impact on the other railroads in the area, warranted approval of the transaction without consolidation of the proceeding with others then pending. 317 I.C.C. at 265–66. In the N&W–Nickel Plate merger case, the Commission held that the benefits of the merger, together with the lack of material adverse effect upon other railroads, warranted consummation rather than consolidation with the Penn-Central proceeding then pending. At 324 I.C.C. 18, the Commission expressed its concern "that delaying our decision in these proceedings until such time as the Pennsylvania-Central merger is ready for our final determination may endanger, or defeat entirely, the unification which the evidence here of record establishes beyond question to be in the public interest."

While the C&O-B&O control and the N&W-Nickel Plate merger cases were pending before the Commission, the Senate Subcommittee conducted hearings on the merger moratorium legislation. The then Assistant Attorney General in charge of the Antitrust Division, the Honorable Lee Loevinger, supported the enactment of legislation, citing among other grounds the view of his agency "that the numerous and far-reaching railroad merger proposals now pending should not be decided on an *ad hoc* basis

but rather with a view to the broader consideration of the overall effect upon the national transportation system and economy." *Hearings on S. 3097 Before a Subcommittee of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 555 (1962). Referring to the position taken before the Commission, Judge Loevinger testified, at page 561:

> The Department of Justice took the position earlier in the present merger movement among the railroads that the ICC should take an overall view, not necessarily that it should consolidate all cases, but that it should not decide the cases singly and individually without consideration of the interrelationship between the railroad systems that would be left and without consideration of the effect that the decision in each case might have upon the other dependent cases.

The Commission's C&O-B&O decision, including the Commission's refusal to order the consolidation of the proceedings, was challenged in the *Brotherhood* case, *supra*. In that case, the three-judge court characterized the Department's position before the Court as a request for "further proceedings [to] include the consolidation of the C&O application with two railroad merger applications now before the Commission, and to withhold decision of the C&O matter until conclusion of the hearings on such other applications, to the end that a contemporaneous decision might be made of all the pending control and merger applications which involve the eastern railroads". The three-judge court in that case disposed of the Department's contention in terms which are wholly applicable here (221 F. Supp. at 29–31):

At the outset, we note that whether hearings should be consolidated is a matter committed to the discretion of the administrative agency. *American Trucking Association* v. *United States*, 326 U.S. 77, 83, 65 S. Ct. 1499, 89 L. Ed. 2065, 2070; *Federal Communications Comm.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S. Ct. 437, 84 L. Ed. 656, 659. *Cf., United States* v. *Northern Pacific Ry.*, 288 U.S. 490, 501-502, 53 S. Ct. 406, 77 L. Ed. 914, 921. * * *

The efforts of the plaintiffs here to set aside the Commission's order is bottomed primarily upon a contention that the problems of all the railroads in the northeast quadrant of the United States should be considered together. In our view, such a program would be but a return to a policy that, after long frustration, was found to be unwise, both by the studies made by the Commission and by the Congress of the United States. It cannot be denied that many years were consumed in laborious effort on the part of the Commission to come up with a plan for the rearrangement of the entire railroad system of the country. At the end of this long period of study and experience, it was the conclusion of those trying to solve the problem that the best solution was to entertain applications initiated by the railroads themselves, and to allow them to attempt, by mergers and affiliations, to slow down and arrest the economic deterioration of the American railroads.

The evidence in this case shows that the B&O, one of the very great railroad systems of the United States, is in critical condition. We think that it would be a disservice to the national policy to hazard the exposing of this railroad to continuing crises by postponing the help that ap-

> pears to be available to it in the control proposal of the C&O. We cannot predict at this time how many months or years would be consumed in trying to find the perfect, or merely a better, solution of the problems of our eastern railroads, large and small. * * * *

The Department's contention that the Commission abused its discretion by not withholding approval of a Penn-Central until it "resolves the fate" of E–L, D&H and B&M, clearly rests upon its assumption that there may be merit to N&W's contention that it is not capable in the face of a Penn-Central merger of absorbing those three railroads (Memo., p. 28), and that, therefore, by authorizing a Penn-Central merger now the Commission "may have lost two of its options for preserving the viability of [E–L, D&H, and B&M]—(1) inclusion of them in an independent Norfolk and Western, (2) their temporary preservation as independent carriers".

The Department's position, if adopted, cannot realistically be viewed as occasioning only a few months' deferment of the Penn-Central merger, while the Commission brings to a close the indemnification and inclusion proceedings before it. For no matter what view the Department may then hold of the Commission's actions and its disposition of the protected railroads, the appellants leave little doubt that they may seek judicial review of the Commission's terms and conditions and, presumably, a further stay of the consummation of the Penn-Central merger in the

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* We have already noted that when the district court's affirmance of the C&O-B&O control order was appealed to this court, the Department endorsed the transaction.

meantime. The entire tone of the litigation in the reopened Penn-Central and the N&W inclusion proceedings most strongly suggests that the controversies between the several railroad factions are far from settled and that a stay, once granted on such notion as is entertained by the Department, will result in a deferment of the merger not for a few months but possibly for several years.

The Commission saw no justification for "postponement, perhaps for several years, of large public benefits which will flow from applicants' merger." 328 I.C.C. at 312; J.S. B–15. The reasons given by the Commission in support of its conclusion amply demonstrate a reasonable exercise of its discretion. Its findings that the merger would result in substantially improved service for the shipping public and in annual savings of at least $80 million for the merged company were unchallenged by the present appellants, other than Shapp and Scranton. Recognizing the competitive impact of the proposed merger, the Commission noted that it had provided opportunities for inclusion of E–L, D&H and B&M in either the N&W system or in a merged Penn-Central. At this point, it should be emphasized, as noted by the Commission in its prior report (327 I.C.C. at 529), that the applicants in the N&W-Nickel Plate merger, "by consummation of their transaction, irrevocably agreed to include [E–L, D&H and B&M] in their system upon terms agreed upon among themselves or, if necessary prescribed by us, provided such inclusion is found to be consistent with the public interest." N&W-Nickel Plate consummated their merger and accepted this

condition with knowledge of the pending Penn-Central merger proceeding, and then deliberately refrained from presenting any evidence in that proceeding as to the competitive impact of the proposed merger upon their new system. Under these circumstances, the Commission was wholly warranted in treating its reservation of jurisdiction to require inclusion of E–L, D&H and B&M in the N&W system as an available solution. In addition, as noted above, in the event of a final determination denying the petition of E–L, D&H or B&M in the N&W proceeding, the Commission has imposed a condition to its approval of the Penn-Central merger, reserving power, upon such carrier's petition, to require its inclusion in the Penn-Central system. Moreover, the Commission has undertaken to provide these three carriers with special protection against diversion of traffic by the merged company pending determination of their inclusion applications.

Having preserved these opportunities for the ultimate inclusion of E–L, D&H and B&M in a major rail system and for their interim protection, the Commission considered the impact of an indefinite delay in consummation of the merger upon the bankrupt New Haven. No one has proposed a solution for continuance of New Haven's operations under private management except as part of a merged Penn-Central system. The Commission is wholly without power to require PRR or NYC or any other railroad to take over New Haven's operations. The Commission's sole power is under Section 5(2)(d) of the Act under which it can require inclusion of New Haven as a con-

dition to approving a Penn-Central merger. Accordingly, in its Report on Reconsideration (328 I.C.C. at 312; J.S. B–15, 16), the Commission unanimously concluded that:

> If consummation of the applicants' merger is deferred several years or indefinitely, we can have no assurance that it will ever occur. The factors that enter into an agreement to merge sooner or later can be affected by changing conditions. Absent the applicants' merger we see no solution to the New Haven problem. * * * We are not prepared to take this risk involved in a substantial postponement of consummation of the merger.

Acceptance of the Department's suggestion that approval and consummation be deferred indefinitely means that no one can know whether there will be a Penn-Central merger which can include New Haven's operations. We do not wish to be guilty of overstatement. However, we submit that neither the Commission nor the courts can overlook the fact that with the passage of enough time a merger agreement can fall apart. There is a limit to the period of time for which managements will defer the changes and improvements which they would make separately in favor of the entirely different things which they would do as a merged company. Also, with the passage of time, there can be changes in the financial and other factors which entered into the negotiation of the basic merger agreement between the two railroads—particularly the stock exchange ratio or the allocation of interests in the merged company to the two groups of stockholders. For example, relative earning power per share with and without merger is one of the im-

portant factors entering into a merger agreement. While we must tread lightly in this area, the following published figures from a 1966 proxy statement from NYC to its stockholders (seeking and obtaining their approval of the merger as conditioned by the Commission's order of April 6, 1966) illustrate the effect of passage of time upon such a factor. Under the merger terms, one share of stock of the Transportation Company will be issued for each share of PRR stock and 1.3 shares for each share of NYC stock.

	Actual earnings per share		*Pro forma for merged company*	
	PRR	*NYC*	*1 share*	*1.3 shares*
1962	($0.24)	($0.59)	($0.32)	($0.42)
1963	.68	1.08	.73	.95
1964	2.12	4.06	2.51	3.26
1965	2.45	6.06	3.31	4.30

We do not remotely suggest that this trend in per share earnings renders the merger terms unfair, because there are many other factors involved. However, it does illustrate that change does not stop while a merger awaits consummation, and that the Commission realistically concluded that upon indefinite deferment of this merger it could have no assurance that it would occur.

We submit that the Commission's resolution of these complex factors in favor of not deferring its decision indefinitely, as urged by the Department, was a reasonable exercise of discretion. The court below was clearly correct in concluding (J.S. A–17):

> We likewise can discern no likelihood of success on the merits in the claims that consummation of the merger should be deferred until conclusion

> of all pending rail merger proceedings relating to the northeastern United States, including a new and controversial one in which C&O and B&O now seek to be included in the N&W system, * * * Decision whether to handle all these consolidations in one giant proceeding or in several rests in the sound judgment of the Commission subject only to its management of the various proceedings so as to promote an ultimate solution fair to the carriers and consistent with the public interest, a task in which it has displayed considerable ingenuity. * * *

B. *The court below did not err in sustaining the Commission's decision to permit consummation of the merger while conducting further proceedings on special conditions for the protection of E–L, D&H and B&M.*

The railroad appellants variously contend that Section 5(2) prohibits the Commission from approving and authorizing consummation of the proposed merger until it has determined the special conditions which it found to be necessary for the protection of E–L, D&H and B&M. The argument goes that, since the impact of the merger upon competing carriers is one of the prime considerations to be weighed by the Commission, it could not find that the merger would so affect certain railroads as to require special protection for them, without simultaneously working out detailed "just and reasonable" protective conditions. Explicit in the argument is the contention that "It is entirely possible, if not likely in this case, that neither adequate nor lawful protective conditions can be devised that are consistent with the public interest" (Br., No. 642, p. 24; see also Br., No. 680, pp. 42–43). Underlying this contention, is the circumstance that

while E–L and D&H strongly favor the principle of indemnity as embodied in Appendix G, the other railroad appellants oppose it as creating a community of interest between E–L, D&H and B&M, on the one hand, and the merged railroad, in that E–L, D&H and B&M would have an incentive to divert traffic from the other appellant railroads to the merged railroad so as to change in their favor the traffic ratio upon which the indemnity is computed, while, conversely, the merged railroad would have an incentive to divert traffic from such other railroads to E–L, D&H and B&M so as to reduce the amount of any indemnity payments. These contentions give rise to three questions: (1) whether the Act permits the Commission to approve and authorize consummation of the merger while reserving for further hearing and determination the prescription of protective conditions; (2) whether the Commission (and the court below) were warranted in assuming that legally adequate conditions can be devised; and (3) whether the court below correctly concluded that consummation of the merger in advance of final formulation of protective conditions would not deprive any of the appellant railroads of opportunity for effective judicial review of the conditions.

The appellants do not contend (at least openly) that the Commission, in approving a rail merger, may not condition its approval by reserving jurisdiction to require the subsequent inclusion of other railroads in the territory involved, upon their petition, and to prescribe terms for such inclusion which will be binding upon the merged company (subject to judicial review). We submit that, *a fortiori*, the Commission possesses and may exercise the lesser power to reserve

for subsequent decision the determination of interim protective conditions for such carriers. And, in the instant situation, where the Commission has reserved jurisdiction to provide for the inclusion of E–L, D&H and B&M in either the N&W system or the Penn-Central system, we submit that it is empowered to permit consummation of a Penn-Central merger which it has found to be in the public interest, while acceding to the appellant railroads' request for further hearing and consideration of special conditions which it has devised for the protection of those three railroads pending determination of their inclusion petitions.

The Commission has long asserted, and been sustained in doing so, power to approve a transaction subject to Section 5 of the Act upon the condition or reservation of power to take further action in the protection of interests recognized by the Act (*e.g.*, employees and competing carriers). Thus, when the impact of a proposed unification upon the applicants' employees was uncertain, the Commission has made its approval and authorization of consummation subject to a reservation of power to impose subsequently protective conditions for employees. *Baltimore Steam Packet Co. Acquisition and Control,* 244 I.C.C. 583 (1941); *Wabash R. Co. Control,* 247 I.C.C. 365 (1941); *Chicago & N.W. Ry. Co. Merger,* 261 I.C.C. 672, 674–675 (1946); *Midwest Buslines, Inc.—Purchase—American Buslines, Inc.,* 80 M.C.C. 681 (1959).

This Court has upheld the Commission's power, in authorizing a railroad to conduct motor carrier operations, to reserve jurisdiction to impose subsequent conditions to enforce the policy of the proviso to Sec-

tion 5(2)(b) against unrestricted motor carrier operations by railroads. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 434-436 (1951); *American Trucking Ass'ns. v. United States*, 356 U.S. 141, 154 (1957).

As far back as the Commission-approved transaction which was involved in *New York Central Securities Co. v. United States*, 287 U.S. 12 (1932), the Commission, in approving a rail unification upon condition that certain short lines be included, permitted consummation of the transaction although the purchase terms for inclusion of some of the short lines was still subject to arbitration. *New York Central Unification*, 154 I.C.C. 489 (1929). See also *Alton R. Co. Acquisition*, 175 I.C.C. 301, 313 (1931), 189 I.C.C. 271 (1933); and *Union Pacific R. Co. Unification*, 189 I.C.C. 357, 363 (1933), in which the Commission conditioned its approval of Section 5 transactions upon the applicants' agreement to acquire so-called short lines on terms to be approved or prescribed by the Commission. More recently, in approving a merger of the Seaboard R. Co. and the Atlantic Coast Line R. Co., the Commission reserved jurisdiction to require the merged company to include up to five short lines upon their petitions for inclusion. When the Commission's order was sustained in *Florida East Coast Ry. Co., et al. v. United States, et al.* (M.D. Fla., Civil Action No. 64-64-Civ. J., opinion dated June 8, 1966), the three-judge court did not even deem meritorious of discussion the contention of Florida East Coast that the Commission was without power to provide for the subsequent inclusion of other railroads.[10] Simi-

[10] Pending on appeals to this Court in Nos. 638, 639 and 641.

larly, in approving the N&W-Nickel Plate merger, the Commission imposed a condition reserving power to require later inclusion in that system of E–L, D&H and B&M. The appellant N&W, having accepted this condition as a prerequisite to merger, is scarcely in a position now to challenge its legality, and we assume that appellants E–L, D&H and B&M have no interest in doing so. Again, in *Illinois Central R. Co., et al.* v. *United States, et al.*, (N.D. Ill., Civil Action No. 65 C 1393, decided August 4, 1966), the three-judge court in the Northern District of Illinois sustained the Commission's order authorizing Missouri Pacific to acquire stock control of C&EI, and expressly sustained the Commission's power to impose as a condition subsequent that MoPac-C&EI negotiate for the sale of an important branch line of C&EI to the Louisville & Nashville Railroad Company.[11]

Generally, the power of regulatory agencies to deal with complex problems in logical stages is settled. *New England Divisions Case*, 261 U.S. 184, 199–201 (1923); *S.E.C.* v. *Drexel Co.*, 348 U.S. 341, 347 (1955); *In Re Electric Bond & Share Co.*, 73 F. Supp. 426, 448 (S.D. N.Y. 1946); *In Re New England Public Service Co.*, 73 F. Supp. 452, 456–457 (D. Me. 1947); *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391 (1959); *F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962).

We conclude that the Commission generally is empowered to authorize consummation of a merger leaving for further and prompt consideration the determination of protective conditions for competing

[11] Pending on appeals to this Court in Nos. 687, 688 and 689.

railroads. In the present case the Commission did even more and made interim provision for the affected railroads pending the prescription of the protective conditions that finally are to apply. It found in its original report that the merger would have such a competitive impact upon E–L, D&H and B&M that "[i]t is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants" and that "unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger." 327 I.C.C. at 532. It was for these reasons that the Commission prescribed in Appendix G to its original report the extraordinary traffic conditions designed to preserve the status quo, reinforced by provision for financial indemnities. In its Report on Reconsideration, in acceding to the request of these appellants for a hearing on the conditions, the Commission in no way withdrew from the "vital" findings underlying its prescription of such unique protective conditions. Indeed, it provided that the traffic conditions should remain in effect pending the subsequent proceeding and that any indemnity provision should be retroactive to the date of consummation.

At this point, we note that D&H states (Br., p. 26):

> We do not question the Commission's power to reserve jurisdiction to reconsider after merger the efficacy and appropriateness of any protective conditions which it finds prior to consummation of the merger to be necessary in the public interest. See Section 5(9) of the Interstate Commerce Act. What is improper here is the Com-

mission's postponement of the exercise of its duty to establish and impose terms and conditions which are essential to the authorization of this merger until after the merger occurs.

Starting with D&H's initial concession, we can conceive of no reply to the logic of the court below (J.S. A-24) that:

> If the Interstate Commerce Commission had initially prescribed only the special traffic conditions and reserved jurisdiction to reconsider these with a view to strengthening them and also to imposing an indemnity, with the Transportation Company bound to accept such changed or additional conditions if it consummated the merger, we would surely not have found the order formally defective under § 5(2)(b) at the suit of other carriers. Yet the only difference between such an order and what has happened is that the Commission initially prescribed financial conditions and then withdrew them for further consideration, with power to impose new conditions retroactively to the date of the merger. * * *

We have discussed the reasons which led the Commission to decline to defer consummation of the merger until the inclusion of E&L, D&H and B&M in a major rail system was determined specifically and finally. The same considerations support its refusal to defer consummation until it had completed limited further proceedings to reconsider the interim protective conditions for those three railroads. We now set forth additional considerations justifying the Commission's refusal to defer consummation until it had completed its reconsideration of the protective conditions.

At the outset, we analyze briefly the claim of the appellant railroads to protection from the enhanced competition of a Penn-Central system. As the court below stated (J.S. A–27, 28), there is no principle of law under which the appellant railroads are entitled to 100 percent protection against adverse effects of a proposed merger. Rather, as the court stated (J.S. A–28):

> What the law requires, and what the Commission found it to require in both reports, was that the merger should not affect the viability of the three carriers between consummation and a fair opportunity for incorporation into larger systems; when the Commission in its first report framed conditions designed "to prevent *any* loss of revenue; * * * as a direct result of immediate consummation of the merger," 327 I.C.C. 532, during this interim period, it did something doubtless within its powers but beyond the Act's demands. * * *
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> * * *

In brief, the Commission is not obliged, even if it is possible to do, to devise interim protective conditions which will perfectly and certainly protect each of the appellant railroads from *any* diversion of traffic."

We contend, with the court below, that to be entitled to injunctive relief, the various appellant railroads had the burden of demonstrating that consummation of the merger prior to final determination of the interim protective conditions will cause irreparable injury to some of them. Applying that principle to

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" E–L states in its brief (p. 42), that it "does not contend that the Commission's findings in the April 6 Report called for traffic conditions which would be 100% effective".

this case, appellants had the burden of showing that it was unlikely that the Commission could devise adequate interim protective conditions in time to protect them from substantial diversion of traffic to the merged company. Appellants clearly failed to meet that burden, although the appellants N&W, C&O, et al., do indeed contend that "It is entirely possible, if not likely in this case, that neither adequate nor lawful protective conditions can be devised that are consistent with the public interest" (Br., No. 642, p. 24).[13]

The Commission found in its Report on Reconsideration (328 I.C.C. at 312; J.S. B–14) and the lower court concurred (J.S. A–30) that "the task of implementing a merger of this size is so vast and complex that its competitive effects will occur only gradually." In so finding, the Commission cited the testimony of Mr. William White, chief executive officer of both E–L and D&H (and a former president of NYC) in the N&W inclusion proceeding *before* the Appendix G conditions were announced that E–L would not "be substantially and adversely affected immediately upon consummation of [the Penn-Central] merger," and that "the effects would begin to be felt perhaps in the second year, and not in the first year."[14] As the court below noted (J.S. A–30) during the oral argument before it, counsel for B&M conceded "that the impact of

[13] D&H, after arguing strenuously that the traffic conditions are inadequate to protect it (Br., pp. 31–42), deems them so effective in denying to shippers the improvements in service that the merger is expected to bring that a stay of its consummation would not be detrimental to the public. Br., pp. 45–50.

[14] In its original report (327 I.C.C. at 531), the Commission's basic finding as to competitive impact upon E–L, D&H and

the Penn-Central merger and the diversionary effects of the merger would be less to it than to E–L and D&H", a concession which is reinforced by B&M's decision not to appeal to this Court. It is important to note, in addition, that D&H is much stronger than E–L or B&M in terms of consistent earnings and cash reserves. In the meantime (assuming consummation of the merger) the present traffic conditions of Appendix G will be in effect. Upon their face, they will afford significant protection against diversion of traffic (in addition to the delayed effect of the merger).

Coupled with the delayed effect of the merger is the factor as to the amount of time which would elapse between consummation of the merger and the effective date of the interim protective conditions as finally prescribed by the Commission. The Commission has concluded its further hearing on the interim protective conditions, and final briefs are scheduled to be filed by February 6, 1967. Perhaps more important to this time factor is the fact that PRR and NYC have committed themselves to accept, without judicial review, any revision of the traffic and indemnity provisions of Appendix G (but reserving the right to challenge any provision for indemnity for capital impairment).

On this aspect of the case, we now turn to the appellant railroads in No. 642, N&W and the C&O–B&O family, *i. e.*, C&O, B&O, WM and CNJ. As the Commission noted in its Report on Reconsideration (328 I.C.C. at 317; J.S. B–23), "CNJ, like N&W, made no

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B&M was that a substantial amount of traffic could be diverted from them by the merged company "when the various consolidation of yards and equipment and the new through routes contemplated by the applicants are effectuated".

appearance during the 2 years of hearings; and while C&O, B&O and Reading did appear, they chose to remain silent on the issue of adverse effects". All the appellants in No. 642 contend that any type of condition requiring the merged company to indemnify E–L, D&H and B&M for revenue losses not prevented by the traffic conditions of Appendix G would create the alleged "community of interest", described above, which they contend would divert substantial amounts of traffic from them. These railroad appellants in No. 642 remained silent while E–L, D&H and B&M were asking the Commission to find that their inclusion in the Penn-Central unification would be consistent with the public interest. It is obvious that the inclusion of E–L, D&H and B&M in a Penn-Central system would comprise a far more complete "community of interest" on traffic matters than any kind of indemnity condition. And, as the Commission noted in its Report on Reconsideration (328 I.C.C. at 327; J.S, B–40) "any adverse effect the special and temporary protective conditions might possibly have on other connecting carriers would not be as lasting as the permanent inclusion of E–L, D&H and B&M in the [Penn-Central system] would be". All of this indicates clearly that the "community of interest" theory of injury to the appellants in No. 642 from any form of indemnity provision is of recent conception and may properly be left to reconsideration by the Commission, subject to judicial review.

The Commission's Report on Reconsideration necessarily reflects its belief that it can devise conditions which will adequately protect E–L, D&H and B&M

without undue injury to other railroads. During the oral argument in the court below, counsel for N&W, C&O, B&O, et al., stated that "we do not say that there are no protective conditions which, at the same time, would protect the Erie and also not throw them into a revenue pot." In the N&W inclusion proceeding, Erie-Lackawanna, in its reply brief filed on October 19, 1966, advised the Commission that:

> While the precise nature of such protective provisions is subject to further hearings as a result of the Report and Order of September 16, 1966, we are confident that the Commission can and will devise conditions which will protect EL against any interim loss of earnings due to diversion of traffic to Penn-Central before EL is included in N&W.

In this context, we submit that the court below was clearly correct in stating (J.S. A–36) that "we cannot take seriously the dismal forecast that conceivably it might prove impossible to fashion any financial conditions that would give adequate interim protection to the three lines without unlawfully harming others".

There remains the appellants' contention that the court below, in declining to enter a stay against the consummation of the PRR–NYC pending the outcome of the reopened proceeding before the Commission, denied them effective judicial review of the modified interim traffic and indemnification conditions (Br., No. 642, p. 33; Br., No. 680, p. 42; Br., No. 691, p. 45; Br., No. 814, p. 38; Br., No. 815, p. 40).

Their argument, in substance, is little more than a restatement of their disbelief that the Commission will ever be able to fashion conditions adequate for the protection of the E–L, D&H and B&M against the traffic and revenue losses attributal to the PRR–NYC merger that will not themselves be detrimental to the other, unprotected railroads in the area. Since a reviewing court, finding the Commission should be reversed, would be able to do no more than "lay bare" the error of the Commission and remand the proceeding for yet further, time-consuming consideration by the Commission, *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) the appellants say, it was error for the district court not to have enjoined the merger until appropriate conditions had been devised by the Commission.

Here, the Commission has committed itself to prescribe interim protective conditions "to obviate impairment or serious weakening of E–L, D&H, or B&M, or the rendering of them individually or collectively less capable of providing service to their shippers and connections" (327 I.C.C. at 532). Indeed, the Commission went further by prescribing the Appendix G conditions which the court below characterized correctly as "unprecedented in their severity in the history of railroad mergers." Upon the request of all of the railroad appellants, the Commission ordered limited further proceedings both to consider their adequacy to protect E–L, D&H and B&M and to prevent or minimize the traffic diversions which the other appellant railroads allege will be caused by the original indemnity conditions. When the Com-

mission again prescribes the protective conditions, the issues before the court called upon to review them will be relatively narrow. We have pointed out that none of the appellant railroads is entitled to perfect protection against diversion of traffic. If it can be demonstrated that the conditions are inadequate in one or more respects to meet the Commission's stated purpose to protect the appellant railroads' ability to serve the shipping public, the reviewing court must find that as a matter of law such inconsistency requires remand to and reconsideration by the Commission. With the court below (J.S. A–36) "We cannot believe that, on such narrow issues as will here be presented, courts and commissions must engage in * * * an infinite regression". As a practical matter, the prediction of traffic diversions resulting from the merger is far from an exact science. In view of the Commission's continuing jurisdiction under Section 5(9) to review and modify any protective conditions in the light of the appellant railroads' actual experience with traffic diversion, it may well be that immediately upon the Commission's prescription of the conditions, a reviewing court should limit itself to determining whether, in the light of the record made in the further hearing before the Commission, the conditions on their face will subject any of the appellant railroads to such a diversion of traffic as would impair their ability to serve the public. If a court were to determine that such would be the effect of the conditions, it cannot be doubted it would be able to specify in what respects the Commission has

erred and to remand the proceeding to the Commission for further action.

If contrary to the firm view of the court below, the reviewing courts should conclude, as some of the appellants now suggest, that it is impossible to devise protective conditions which will not affect the viability of some of the appellant railroads, then it follows that the courts may set aside the Commission's whole order and require dissolution of the merger. In *United States* v. *El Paso Gas Co.*, 376 U.S. 651, 662 (1964) upon finding that a natural gas company merger violated Section 7 of the Clayton Act, this Court without discussion "direct[ed] the District Court to order divestiture without delay". *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966), relied upon by appellant in No. 642 for the proposition that dissolution of the merger would be impracticable, is readily distinguished on its facts. In any case, in the unlikely event that the courts should conclude that proper protective conditions cannot be developed, the burdens of dissolution would fall on the applicant carriers—not the appellants.

The appellants in No. 642 (Br., pp. 29–30) contend that "Any arrangement similar to the indemnity" conditions of the Commission's April 6 report would constitute a violation of Section 5(1) of the Interstate Commerce Act", which prohibits "any contract, agreement, or combination" among carriers "for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof" unless the Commission finds that such pooling or division "will be in the interest of better service to the public or of

economy in operation, and will not unduly restrain competition."

The Commission held that the indemnity conditions of Appendix G would not constitute pooling within the meaning of Section 5(1) in that "they do not constitute a 'contract, agreement or combination,' entered into by carriers involved" (328 I.C.C. at 326; J.S. B-39, 40). We submit that the Commission was clearly correct, because as a condition to approval of a merger it can hardly be regarded as a consensual act of the carriers. Moreover its indemnity provision was a one-way street under which the merged company might be obliged to make payments to E-L, D&H and B&M, but they would never be required to make payments to the merged company. There was wholly lacking "the correlative surrender or contribution by the other parties such as is necessary to the existence of a pool in the common interest of all, and from which all would share without regard to individual performance". *Atlantic Greyhound Corp.—Pooling*, 37 M.C.C. 543, 551 (1941). See, generally, *Pooling of Railroad Earnings and Service, Pullman Co.*, 268 I.C.C. 473 (1947).

Moreover, even if the indemnity provision constituted "pooling", Section 5(1) is not a limitation upon "the power of the Commission to approve new combinations of carriers", any more than were the short-hauling restrictions of Section 15(4) upon the establishment of new through routes, in *Atlantic Coast Line R. Co. v. United States*, 284 U.S. 288, 295 (1932). *Chicago & N.W. Ry. v. Peoria & P.U. Ry. Co.*, 319 F. 2d 117 (7th Cir. 1963), cert. denied, 375 U.S. 969,

relied upon by appellants, is inapposite in that there the Commission did not purport to prescribe what was done as a condition to its approval of a Section 5(2) transaction.

Finally, as the court below noted with respect to the Section 5(1) contention, "Perhaps there will be no provisions that could even arguably come under that section; if there are, the Commission may decide to make findings under Section 5(1) and these also can be reviewed" (J.S. A–26). Apropos of that court's latter suggestion, we submit that it was clearly correct in refusing to hold in advance that any form of indemnity which the Commission might prescribe (assuming it to constitute pooling) could not be supported by the findings required by Section 5(1). It seems highly likely that an indemnity condition designed to insure the continuance of the services of E–L, D&H and B&M pending their inclusion in a large system "will be in the interest of better service to the public * * * and will not unduly restrain competition." The appellants' Section 5(1) argument is premature.

Brief comment should be made on the contention of several appellants that all of the prior and recent rail unifications which were approved by the Commission and challenged in the courts were stayed pending the completion of judicial review proceedings. This is true, but in each of those prior cases, the transaction was challenged on its merits. As the court below noted, the unique thing about this case is that the proposed Penn-Central merger as authorized by the Commission is not challenged on its

basic merits by carriers, shippers, or public bodies (leaving aside the flimsy challenges of Shapp and Scranton).

It should be clear that the appellant railroads are not asking that consummation of the merger be deferred merely until the Commission issues a further report and order on the interim protective conditions. Their own argument that prior consummation of the merger will deprive them of opportunity for effective judicial review clearly reveals that they are demanding that consummation be deferred until after the Commission has acted *and* until judicial review of its action has been completed. This is why the court below, after noting that the Commission might complete its further proceeding by the spring of 1967, nevertheless concluded that "When account of all of this is taken, any realistic estimate of delay of consummation from an injunction pending reconsideration would take us to the end of 1967" (J.S. A–32–33). We do not contend that even such a substantial delay will defer completion of the New Haven inclusion proceedings. Rather we say again that the longer consummation is delayed the greater the risk that there will be no merger into which New Haven's operations can be included.

II. Appellant Shapp Lacks Standing To Attack the Merger as Such.

In sharp contrast to the railroad appellants, appellant Shapp maintains a sweeping attack upon every significant aspect of the Commission's orders approving the merger. Although the lower court made no point of it, we submit that Shapp lacks standing to do

so. *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 194 (1953). Shapp represents himself to this Court as (1) a former Philadelphia businessman and citizen of Pennsylvania, (2) a PRR stockholder and (3) an active participant in the Commission proceedings. In each of these capacities he lacks the requisite standing to attack the merits of the merger transaction as approved by the Commission.

A. *As an active participant before the Commission*

The law is clear that Section 2323 of Title 28 of the United States Code does not authorize a participant before the Commission to institute a suit to set aside an order unless some legal interest of the participant is adversely affected. In *Alexander Sprunt & Son* v. *United States*, 281 U.S. 249 (1930), the Commission's order directed certain railroads to remove undue prejudice and preference caused by their rates on cotton shipped from interior points to certain Gulf ports. Suits by the carriers and Sprunt & Son were consolidated and the validity of the order sustained. Only Sprunt & Son appealed. This Court held that [at pp. 254–255]:

> * * * [A]ppellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under Section 3 of the Interstate Commerce Act. *For, their competitive advantage was threatened. Having*

this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under * * * the Judicial Code to intervene, as of right, in any suit "wherein is involved the validity" of the order entered by the Commission. *But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier.* In the case at bar, the appellants have no independent right which is violated by the order to cease and deist. * * * [Emphasis added.]

Accord, *Youngstown Co.* v. *United States*, 295 U.S. 476, 479 (1935); *Moffat Tunnel League* v. *United States*, 289 U.S. 113, 119–120 (1933); and *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479, 486 (1930).

B. *As a PRR stockholder*

As a stockholder of the PRR, Shapp has standing only to raise issues affecting the financial or legal interests of stockholders *per se*. See *Schwabacher* v. *United States*, 334 U.S. 182 (1948), and *Stott* v. *United States*, 154 F. Supp. 389 (S.D.N.Y. 1957). He presents no such issues and, hence, on this ground, is unable to challenge the merits of administrative action.[15]

[15] See, also, *Oscar Gruss & Son* v. *United States*, Civil Action No. 66 Civ. 3413 (S.D.N.Y., Nov. 28, 1966), —— F. Supp. ——.

In *Pittsburgh & W. Va. Ry.* v. *United States, supra*, the plaintiff, a minority stockholder and connecting carrier of the Wheeling & Lake Erie Railroad, sought to enjoin a Commission order authorizing the Wheeling to abandon its Cleveland station and use newly erected union terminal facilities. This Court, at 487–88, held that the Pittsburgh had no standing to bring suit to set aside the Commission's order, although the Pitsburgh had intervened in the Commission proceeding:[16]

> Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, * * * the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order. The bill should have been dismissed without inquiry into the merits. [Footnotes omitted].

In *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957) this Court reiterated the principle of the

[16] Cf., *Chicago Junction* Case, 264 U.S. 258, 267–8 (1924).

Pittsburgh & W. Va. case, *supra.* While holding that the stockholders had standing to contest approval of a preferred stock issue, this Court held that Alleghany stockholders were not, by that fact alone, entitled to bring suit to challenge the validity of the Commission's approval of a merger proceeding under Section 5(2). This Court stated, at p. 174–5:

> The fact that appellees were common stockholders of Alleghany is insufficient "interest". The proceeding before the Commission was to determine whether the Jeffersonville-Big Four merger was a transaction requiring Commission approval * * *. Unlike the subsequent preferred stock order whose threatened financial injury to appellees was sufficient to confer standing to bring the present proceedings, the merger agreement had no special effect on appellees or on common stockholders of Alleghany. See *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 19–20. Nor did the proposed status order that Alleghany should be "considered as a carrier" and therefore regulated by the Interstate Commerce Commission by itself pose any individualized threat to the welfare of the appellee.
>
> * * * No special threat to appellees arises from the mere assertion of Commission jurisdiction to regulate Alleghany. When subsequent commission action in approving the Alleghany's new preferred stock issue did present a special threat to appellees, that provided the "interest" sufficient to attack the Commission's jurisdiction in the present proceeding. But this threat could not retroactively confer upon them the right to a hearing in the merger-status order proceeding, in which they had no "interest".

Here, there is no issue presented as to the fairness of the merger terms or, as in *Alleghany Corp.*, no "individualized threat to the welfare of [Shapp or others similarly situated]."

C. *As a citizen of Pennsylvania and former businessman*[17]

Shapp, as a citizen, lacks standing to challenge the merits of the merger. To maintain an action in a federal court he must show an interest of his own.[18] *McGowan* v. *Maryland*, 366 U.S. 420, 429–430 (1961); *Poe* v. *Ullman*, 367 U.S. 497 (1961); *Tileston* v. *Ullman*, 318 U.S. 44 (1943); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Frothingham* v. *Mellon*, 262 U.S. 447 (1923); and compare *Davis, Administrative Law Treatise*, Section 22.10 (1965 Pocket Supp.). This Court has not entertained an action brought to vindicate the public interest by a citizen having no legal interest of his own. For example, in *Moffat Tunnel League* v. *United States*, *supra*, an unincorporated association composed of groups of persons, social and civic in character, intervened and opposed before the Commission the Denver & Rio Grande Western Railroad's application to acquire control of the Moffat Road, alleging that the acquisition would be detrimental to the development of certain sections of the State of Colorado. In holding that plaintiff lacked

[17] Since it does not appear (it is not even alleged) that Shapp is a shipper who uses any carrier service, his capacity as "a former businessman" provides no standing to contest the merits of the merger.

[18] Section 10(a) of the APA permits judicial review at the behest of one who is "adversely affected", and both the Senate and the House Committee reports state that this means "adversely affected in fact." Sen. Doc. No. 248, 79th Cong., 2d Sess., 212, 276 (1946).

standing to sue and contest the merits of the merger, this Court stated, at p. 119–120:

> * * * the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. * * * Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment, such as may be entertained by members of the territory west of Craig, that improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points. * * *

Here, appellant Shapp predicates his standing on alleged contraction of railroad facilities in the Commonwealth of Pennsylvania, loss of freight train service to various communities in the State, and serious injury to the ports of Erie and Philadelphia,[19] all of which he alleges is a "most serious threat to the economy of Pennsylvania today" (Br., p. 9). He shows no legal right or interest of his own that will be injuriously affected but only a concern that the economy of the State and local communities and ports may suffer. But concern is not the equivalent of such an interest that will be injuriously affected as is necessary to create standing. See *Alleghany Corp.* v. *Breswich & Co., supra,* 353 U.S. 151 at 173; c.f., *L. Singer & Sons* v. *Union Pacific R. Co.,* 311 U.S. 295, 305–306 (1940). As a private citizen concerned with the

[19] It should be again noted that the business communities of Philadelphia and Pittsburgh support prompt consummation of the merger.

general economy and public interest of the State—matters long ago rejected as significant factors in the application of section 5 criteria—[20] Shapp advances contentions that are at odds with the fact that the State is not opposed to the proposed merger. As this Court stated in the context of the *L. Singer & Sons* case, *supra,* at p. 305:

> * * * To entrust the vindication of this public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress.

We submit that Shapp has no standing to vindicate the rights of the public by a sweeping attack on the merits of the merger, as such, when the State and its communities, with the exception of the City of Scranton, do not oppose the merger.

III. Scranton's Attacks on the Merits of the Merger Should Be Given Little Weight Because of the City's Fragmentary and Shifting Position Throughout the Case, and Because They Lack Merit.

For many of the reasons offered with respect to Shapp, appellant, City of Scranton, lacks standing to maintain its action. *New Jersey* v. *United States,* 101 F. Supp. 702 (D. N.J. 1950). However, even if its standing were assumed, Scranton would be foreclosed from waging its far-ranging attack upon the Commission's order approving the Penn-Central merger. Before the Commission, the City's participation was virtually token and was limited to specific concern over the impact of the merger upon the E–L.

[20] *Texas* v. *United States,* 292 U.S. 522 (1934).

Scranton's entire presentation before the Commission consisted of a three and one-half page prepared statement, dealing solely with the significance of the E–L to the local economy as a carrier and employer (Statement S–157).[21] The City filed no exceptions to the Examiners' report; nor was any brief submitted. Following the report of the Commission, Scranton filed a form petition for further hearing and reconsideration, directed primarily to the need for protection of the E–L.[22] Specifically, the City requested a further hearing "* * * to fully explore the protective provisions for E–L, Reading and CNJ, and the impact of the prescribed conditions upon this petitioner."

Thus the entire thrust of Scranton's position before the Commission, fragmentary as it was, went to the question of protection for the E–L and not to the merits of the merger itself. Nowhere in the prepared statement or in the petition for further hearing and reconsideration was there the slightest intimation of most of the arguments now being pressed by Scranton on the merits.

The fact that Scranton did not make any serious

[21] Specifically, the statement noted: (a) the importance of E–L, as to the mining, processing, and shipment of anthracite coal—a prime factor in the local economy; (b) the need for superior rail service so as to attract new industry and thus offset unemployment; (c) the role of E–L as employer and "payroll generator"; (d) the volume of rail freight from, to and through the area; and (e) the passenger and mail service provided by E–L.

[22] Identical form petitions were also filed by the Cities of Pottsville and Allentown, and by the counties of Lackawanna, Beaver and Lehigh. These parties have now apparently abandoned their opposition.

attack upon the merger until the case went to court should, in our view, detract from any weight which might otherwise attach to the City's appeal. Insofar as Scranton's real interest turns on the fate of the E-L, the City has received much of what it asked for—a further hearing to explore the protective conditions, at which Scranton, as a party, was "free to participate" (328 I.C.C. at 328; J.S.B.–42), but failed to do so. Under these facts, then, we suggest that Scranton's attack upon the merits should not be regarded as any barrier to prompt consummation of the merger.

A. *The standard utilized by the lower court in denying injunctive relief*

The court below, in the absence of invited objections,[23] accepted as a correct formulation of the standard governing its exercise of discretion the four factors laid down by the Court of Appeals for the District of Columbia in *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958):

1.) whether the petitioner has made "a strong showing that it is likely to prevail on the merits";

2.) whether the petitioner has shown that without interim relief it will have been irreparably injured if it ultimately prevails;

3.) whether the issuance of a stay would substan-

[23] "If any counsel thinks that that is not the correct standard we would like him to say so before we go on." Transcript of Hearing, September 21, 1966, p. 36. In a subsequent brief filed in the district court on behalf of "Pennsylvania communities" and signed, *inter alia*, by present counsel for Scranton the criteria of the *Virginia Petroleum* case were treated as being controlling.

tially harm the parties opposing it if they ultimately prevail; and

4.) whether the public interest will have been adversely affected by a stay if the validity of the order is ultimately sustained.

This standard—adopted in the District of Columbia and Second Circuits—is nothing more than a compendium of familiar factors which have traditionally guided courts of equity in ruling upon requests for stays of administrative or judicial review. See, generally, *Yakus* v. *United States*, 321 U.S. 414, 440 (1944); *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, 10–11 (1942); *United States* v. *Corrick*, 298 U.S. 435, 437 (1936); *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 513–14 (1931); *Alabama* v. *United States*, 279 U.S. 229, 231 (1929); *Virginian Ry.* v. *United States*, 272 U.S. 658, 672–73 (1926). We think it apparent that Scranton acquiesced at all relevant times in the use of the *Virginia Petroleum* standard and that, in any event, such standard was an appropriate one.

B. *The national economy and the railroads*

Scranton makes a sweeping economic attack on the merger, arguing that the Commission's view of the railroads' predicament was too pessimistic and that the correct view was that espoused by Mr. Leon Keyserling in an oral argument made to the Commission. Mr. Keyserling, as we read the record, first appeared in the case as a witness for the Railway Labor Executives' Association, a group whose opposition to the merger has long since vanished. Some two years later Mr. Keyserling, through arrangements made by the office of Milton J. Shapp, ap-

peared before the Commission on behalf of the Borough of Ambridge (Pa.), the County of Lackawanna (Pa.), and the Pennsylvania cities of New Castle, Erie, Allentown, and Shamokin—also parties whose opposition to the merger now has been abandoned. The record does not show that Mr. Keyserling ever appeared before the Commission, in any capacity, for the City of Scranton. Hence, appellant is now in the anomalous position of contending that the Commission is likely to be reversed because of views expressed in an oral argument made by an attorney who represented someone else at the time.

In any event, the Commission's failure to adopt Mr. Keyserling's outlook does not itself establish a likelihood of reversal.[24] Initially we doubt whether the process of economic forecasting is so well refined that any one approach can be regarded as clearly right and another as clearly wrong. The entire area is one over which responsible experts can and do differ.[25]

Reduced to essentials, Scranton's argument amounts to a plea that this Court substitute its judgment for that of the Commission as to the weight to be given Mr. Keyserling's economic views. We submit that reversal on any such basis is highly unlikely under the settled rules that the weight to be given

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[24] Mr. Keyserling was a principal witness in support of the rail merger moratorium legislation, but his views did not win such acceptance as to lead to its enactment. *Hearings on S. 3097 Before a Subcommittee of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess., 587 *et seq.* (1962).

[25] For recent views, including those who see disturbing signs of economic slow-down see *New York Times*, Dec. 12, 1966, p. 79, col. 1; Dec. 15, 1966, p. 1; Dec. 16, 1966, p. 73, col. 4.

evidence—if Mr. Keyserling's oral argument constitutes "evidence"—is for the Commission, and that this Court will not substitute its judgment for that of the Commission on matters entrusted to the agency's discretion. Particularly is this so, where, as here, the Commission's reasoning is the product of expertise developed through years of analyzing the problems of railroads.

The Commission explained that railroads are burdened with the necessity of maintaining large fixed plants whose constant costs do not drop in proportion to reductions in volume (327 I.C.C. at 496). Principally for this reason, the Commission found that railroads are generally among the first to suffer loss of income in times of business recession (327 I.C.C. at 498) and do not make adequate recoveries in times of prosperity. 327 I.C.C. at 495.

Further the Commission found that in none of the years 1960–1964 did applicant Central earn sufficient net railway operating income to meet its fixed charges, and that in only one of these years did applicant PRR earn sufficient net railway operating income to do so (327 I.C.C. at 498). Excluding income from investments made in other than transportation property, both roads operated at a deficit for each of the years 1960–1964 (327 I.C.C. at 498).

Finally the Commission gave much weight to the consistently poor rate of return earned by railroads and by applicants in particular, a factor which the Commission viewed as affecting decisions by the industry itself and by others as to the investment of funds (327 I.C.C. 499–501). The Commission found

that railroads are among the lowest of major industrial groups in terms of return on net worth, with the two applicants continually earning at even a lower rate than the average for other Class I roads (327 I.C.C. at 496). For 1964 and 1965, years of improvement for applicants, their rates of return on net worth were lower than "practically all" industrial groups and even under the yield on United States Treasury Bonds (327 I.C.C. at 499). The Commission found on the basis of the evidence, that "Since 1952, applicants' rates of return have been too low to generate confidence in their financial soundness, to maintain credit, and to raise funds necessary for the discharge of public duties" (327 I.C.C. at 500). The Commission concluded:

> These large operating savings [$80 million] will go far toward compensating for the persistently low rates of return, for the increased earnings flowing from the merger should motivate the unified company to accelerate investments in transportation property and continually modernize plant and equipment. This in turn should enable the unified company to more fully develop and utilize the inherent advantages of railroad transportation in the territory served, and provide more and better service, all to the ultimate benefit of the public. (327 I.C.C. at 501–502).

As to the claim that the merger will endanger the defense effort, we emphasize that no representative of the Department of Defense has ever voiced opposition to the merger, and that the Commission specifically found this argument without any merit (327 I.C.C. at 520). Significantly, Mr. Keyserling admitted be-

fore the Commission that his comments on this score were general in nature and were not the product of any particular study of defense needs (Tr. 12797–98).

C. The effect on Pennsylvania

Scranton asserts that the Commission "totally ignored" the impact of the merger upon communities. While the agency did not analyze the status of each particular community then objecting, it carefully examined the effect of the merger on the Commonwealth of Pennsylvania as a whole (327 I.C.C. at 492–493). The Commission first pointed out that most of the significant Pennsylvania opposition had been withdrawn or substantially lessened—including that of Pittsburgh, Philadelphia and the State itself.[28] Next the Commission found that out of a total of 343 trains now operated by the applicants in Pennsylvania, there would be a net loss of only 24 trains. Moreover, the plan envisioned no loss of service to any point then served. The result was, as the Commission found, "that in practically every case shippers would receive at least as good overall service as at present" (327 I.C.C. at 492). No lines would be abandoned under the proposal. The Commission further found that arguments as to a detrimental effect on Pennsylvania's economy were not supported by substantial evidence, but that, on the contrary, "On this record, the prospects clearly import that the merger will benefit

[28] Included among those having withdrawn opposition were the Borough of Ambridge and the City of New Castle—who had been in the group of clients represented by Mr. Keyserling at the time of oral argument.

rather than harm the Commonwealth" (327 I.C.C. at 492–493).

Thus the Commission did consider the overall impact of the merger upon the economy of Pennsylvania, although it did not, as requested by appellant Shapp, specifically consider the policies of certain federal welfare acts.[27] In view of the Commission's findings as to Pennsylvania, there would have been little point in a statute-by-statute analysis of the acts in question. In any event, the Commission was plainly not required as a matter of law to consider such statutes.

It has long been settled that the "public interest" standard in Section 5 "is not a mere general reference to public welfare * * *." *New York Central Securities Co.* v. *United States, supra,* 287 U.S. at 25; *Texas* v. *United States, supra,* 292 U.S. at 531; *United States* v. *Lowden,* 308 U.S. 225, 230 (1939). We emphasize that the fundamental purpose of Section 5, as amended in 1940, is "to facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States, supra,* 356 U.S. at 416. The argument that these or other such statutes should somehow be regarded as a bar to mergers could be advanced by virtually any locality so as to block almost any proposal and is, in our view, entirely inconsistent with the Congressional purpose underlying Section 5. Moreover, it has long been settled that demands of a particular local econ-

[27] The Employment Act of 1946; the Area Redevelopment Act of 1961; the Manpower Development and Training Act of 1962; the Economic Opportunity Act of 1964; and the Appalachian Regional Development Act of 1965.

omy are not in themselves obstacles to transactions under Section 5 of the Interstate Commerce Act. *Texas* v. *United States, supra; Seaboard R. Co.* v. *Daniel,* 333 U.S. 118 (1948); *Callaway* v. *Benton,* 336 U.S. 132 (1949).

D. *The New Haven inclusion*

Scranton argues that the order including the New Haven is erroneous because the Commission referred to pre-1940 decisions of this Court construing the "public interests" and because the Commission referred to certain "public benefits" flowing from the merger (Br., pp. 10–13). We deem its arguments to be groundless.

There is no substantial difference between the term "public interest" as used in the 1920 Act and the same term as used in the 1940 Act. As this Court held in *County of Marin* v. *United States, supra,* 356 U.S. at 417, comparing the two statutes, "[T]he result of the Act [of 1940] was a change in the *means,* while the *end* remained the same." The language in the pre-1940 decisions of this Court, with which Scranton quarrels,[28] is entirely harmonious with the objectives of the National Transportation Policy, which since its enactment as part of the 1940 legislation has been the Commission's guide to the "public" interest". *McLean Trucking Co.* v. *United States, supra.*

Moreover since the term "public interest" was retained in the 1940 Act after several constructions by

[28] *New York Central Securities Co.* v. *United States, supra,* followed in *Texas* v. *United States, supra,* and *United States* v. *Lowden, supra.*

this Court, it is reasonable to assume, under familiar principles, that no change in meaning was intended. Finally we note that the Commission has consistently construed the "public interest"[*] standard of the 1940 Act by making reference to the language of this Court, which Scranton now contends is outmoded and inapplicable. See, *e.g., Associated Transport, Inc.—Control and Consolidation,* 38 M.C.C. 137, 146 (1942), affirmed, *sub nom. McLean Trucking Co.* v. *United States, supra; Chesapeake & O. Ry. Co.—Control—Baltimore & O.R. Co., supra; Norfolk & W. Ry. Co. and New York C. & St. L. R. Co.—Merger, supra.* This settled pattern of construction should be entitled to great weight, particularly in view of the nature of Scranton's attack."

Contrary to Scranton's argument, the Commission in passing on the New Haven inclusion, did consider the train discontinuance legislation of 1958 (49 U.S.C. 13a). On the same day that the Commission ruled on the Penn-Central merger, it also handed down a decision in *N.Y., N.H. & H. R. Co., Discontinuance of all Interstate Passenger Trains,* 327 I.C.C. 151 (1966), finding that continuance of many of the New Haven's passenger service for an interim period was required by the public convenience and necessity and

[*] The contention that the term "public benefit", used by the Commission, is somehow inconsistent with the concept of "public interest" seems more semantic than substantial. Surely "the advantages of improved service, safer operation, lower costs, etc.," recognized by this Court in *McLean, supra,* as illustrative of the "public interest", amount to the same thing as "public benefits." Significantly in the decision underlying *McLean,* the Commission spoke of these and other factors as being "benefits" to the public (38 M.C.C. 143–146, 150, 172).

would not unduly burden interstate commerce. That decision under Section 13a was closely interwoven with the Commission's discussion of the New Haven inclusion in the Penn-Central (327 I.C.C. at 523–526). The Commission explained that it had obtained a broader view of the NH inclusion issue as a result of the 13a procedings, and specifically made it findings as to the NH inclusion "* * * in light of and subject to the order in the Section 13a proceding * * *" (327 I.C.C. at 524).

The inclusion does not require the patrons of the merged company to subsidize the New Haven passenger operations. The partial continuance of the New Haven passenger service was viewed by the Commission an interim "holding operation", and certainly not as any permanent solution to the problems of that carrier. After discussing the "restructuring" efforts which must be made by all parties concerned with the preservation of NH service, the Commission stated that it viewed the 13a proceeding as an interim proposition designed in large part to give the applicants and the various State governments further opportunity to develop the details of agreements as to public support (327 I.C.C. at 526). The Commission concluded:

> Thus, the inclusion of New Haven's passenger service shall in no way be applied or construed to mean that New Haven passenger deficit operations, if undue, must be borne by the savings resulting from this merger. (327 I.C.C. at 526).

Hence, we submit that in determining to order inclusion of the New Haven—a matter which the court below found "strongly in the public interest"—the

Commission carefully and rationally considered the factors embraced within Section 13a of the Act.

IV. C&EI's Fears of Undue Traffic Diversion Were Considered and Found Unwarranted.

C&EI, as do the other so-called unprotected railroads, premises its appeal largely upon a professed concern that the Commission in the reopened proceeding before it may fashion indemnification conditions that will ally the protected carriers, the E–L, D&H and B&M, in a community of interest with the Transportation Company to its considerable detriment. To that extent the contentions of the C&EI already have been discussed. Page 66 *et seq.* Additionally, however, C&EI claims that it will suffer undue traffic diversion to the Transportation Company, apart from what conditions may be imposed. In this respect, C&EI is unique among the appellants, for, other than the limited showing of WM, the C&EI is the only one of the carriers which presented evidence before the Commission in opposition to the merger on the ground that the Transportation Company would be able to divert a substantial volume of traffic.[30] This position

[30] Alternatively C&EI sought imposition of certain conditions upon the Commission's approval of the merger designed to ameliorate the alleged impact of the merger upon its traffic and revenues. As relevant herein, the Commission (327 I.C.C. at 542) adopted the examiners' findings and conclusions with respect to their refusal to impose conditions 3 and 4 as proposed by C&EI. These conditions would have required the merged company (1) to open all its junctions and gateways served by C&EI to traffic at the lowest applicable rate available through any other junction or gateway of the merged company, (2) to establish new routes with applicable competitive joint rates and just and reasonable divisions on traffic handled by the merged company in connection with other railroads via available

was reiterated by the C&EI in its exceptions to the Examiners' report and in its petition for reconsideration and accordingly merits independent consideration herein.

C&EI presented evidence before the Commission, among other things, indicating that during March 1962, it interchanged with applicants and other railroads a total of 8,440 carloads of traffic moving to and from the New England States, New York, New Jersey, Pennsylvania, Delaware, Maryland, District of Columbia, Virginia, West Virginia, Ohio and Michigan. (Examiners' report, p. 315). All of this traffic, which represented approximately 30% of the total number of cars handled and accounted for $735,908 or about 26% of the revenues earned by C&EI during the month, would be subject to possible diversion by the merged company according to C&EI (Id. at 316).

The Examiners, based on a detailed assessment of the nature, character and specifics of the traffic claimed by C&EI to be subject to possible diversion, to the extent such was possible from the incomplete evidence presented by C&EI, differed with C&EI's estimate of the extent of possible diversion, for the following reasons:

(1) A large portion of the traffic originated or terminated on C&EI's lines is apparently origi-

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junctions and gateways, and (3) to provide reciprocal switching at all new industries located at points served by the merged company in common with any other railroad (Report, pp. 310-21).

nated or destined for closed or local points[31] on C&EI's lines with the result that C&EI's participation in such traffic would not be lost even if the Transportation Company were able to divert such traffic from its eastern connections[32] (Id. at 317); and

(2) With respect to overhead traffic,[33] approval of the merger will not create any new channels of trade or gateways for the merged company not presently maintained by Central; nor will the service of the merged company in the territory served by C&EI be materially improved over the

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[31] Closed points are points not served by any other rail carrier. Local points are points at which, although another carrier serves the point, the shipper is located on C&EI's lines and not those of the other carrier with the result that diversion of such shipments is extremely unlikely (Id.).

[32] For example, the examiners found that of the 4,175 carloads of such traffic interchanged with Penn or Central during March, 1962, 1,877 consisted of coal received from Central and destined for Joppa, Illinois, a closed point on C&EI, which traffic in no event could be diverted to the merged system (Id. at 319). Of the remaining 2,298 carloads of such traffic interchanged with Penn or Central only 891 were originated at or destined to points on C&EI's lines served in common with Penn, Central or both and therefore considered by C&EI to be highly susceptible to diversion by the merged company. However, even with respect to this common point traffic the examiners concluded that the "merged company would stand in no better [competitive] position [vis a vis C&EI] than [Central] today which has a single line route and can supply all the equipment that is needed by such shipper" with the result that "although the slight improvement in service by the merged company might result in a diversion of some of the common point traffic, it has not been shown nor do we believe that such diversion would materially affect C&EI operations" (Id. at 320).

[33] Traffic which neither originates nor terminates on C&EI's lines and as to which it serves simply as a bridge between the lines of the originating and terminating carrier.

comparable service presently being offered by Central, with the result that between its major points C&EI will still have the best service routes (Id. at 318).

In addition, C&EI contended generally that unspecified amounts of the following traffic would be subject to diversion of the merged company:

(1) traffic moving to and from Kentucky over the C&EI-L&N route.

(2) traffic moving northwest of Chicago and southeast of Louisville.

(3) coal traffic moving from southern Illinois and Indiana to Chicago.

The Examiners discounted the possibility that there would be any material loss of this traffic, finding that, as distinguished from other areas, the changes in operations contemplated by the Transportation Company in the territory served by C&EI are designed to achieve economies and efficiencies rather than to provide a material improvement in north-south service between Chicago on the one hand and St. Louis, Evansville and Southern Illinois points on the other. Accordingly, between C&EI's major points of service its routes will continue to enable it to render effective service to the South despite any foreseeable improvements which the merged company could accomplish (Examiners' report, pp. 316–17). Moreover, the direct and indirect financial interest of MoPac and possibly L&N, if the control relationship approved by the Commission is sustained, will prevent any major diversion of northbound traffic to the merged system (Id. at 318).

Based on the foregoing, the Examiners concluded that "the minor diversion of the type which may be anticipated by C&EI on the basis of the existing record could [not] possibly warrant either a denial of the proposed merger or conditions opening the gateways and junctions and all new industries to reciprocal switching on the merged road" (Id. at 321). Amply supported by evidence, this conclusion, which was adopted by the Commission (327 I.C.C. at 542), was plainly sufficient to dispose of C&EI's contrary contentions. *Minneapolis & St. L. Ry Co.* v. *United States,* 361 U.S. 173, 188–89 (1959); *Brotherhood of Maintenance of Way Employees* v. *United States, supra.*

The court below properly held, in line with this Court's holdings in *McLean Trucking Co.* v. *United States, supra,* and most recently in *Illinois Central R.R. Co.* v. *Norfolk & W. Ry Co.,* Nos. 15, 17 & 20, October Term 1966, decided November 14, 1966, slip opinion, p. 12, that:

> * * * We also see no prospect that C. & E. I. or any other non-protected carrier would be able to persuade a reviewing court to set aside for lack of substantial evidence the findings of failure to show serious diversion arising from the merger itself, as distinguished from the new problems allegedly engendered by the indemnity formula which are yet to be ruled upon [footnote omitted]. (B & O J.S., pp. A–17, A–18.)

This holding of the district court, it is submitted, should be permitted to stand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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